APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 04-0219

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Plaintiff-Appellant,

v.

WORLDCOM, INC., BERNARD J. EBBERS, JAMES C. ALLEN, MAX E. BOBBITT, ARTHUR ANDERSEN, LLP, CITIGROUP GLOBAL MARKETS, CLIFFORD ALEXANDER, JR., JUDITH AREEN, CARL J. AYCOCK, FRANCESCO GALESI, STILES A. KELLETT, JR., GORDON S. MACKLIN, JOHN A. PORTER, BERT C. ROBERTS, JR., JOHN W. SIDGMORE, LAWRENCE C. TUCKER, JUAN VILLALONGA, ABN AMRO INCORPORATED, BANK OF AMERICA SECURITIES, LLC, BANK OF AMERICA CORPORATION, CREDIT SUISSE FIRST BOSTON, LLC, DEUTSCHE BANK AG, DEUTSCHE BANK ALEX. BROWN, INC., GOLDMAN SACHS & CO., J.P. MORGAN SECURITIES INC., LEHMAN BROTHERS HOLDINGS INC., LEHMAN BROTHERS INC., NATIONSBANC MONTGOMERY SECURITIES, LLC AND UBS WARBURG, LLC,

Defendants-Appellees.

February 26, 2004 Argued
May 11, 2004, Decided

JUDGES: Before OAKES and CABRANES, *Circuit Judges*.[1]

OPINION: JOSE A. CABRANES, *Circuit Judge*:

In this case of first impression in the courts of appeals, we are asked to decide whether a federal district court may exercise bankruptcy jurisdiction over generally nonremovable claims brought under the Securities Act of 1933. This is a close question, as it involves a direct conflict between two unambiguous statutes—Section 22(a) of the Securities Act of 1933,[2] which bars removal of individual Securities Act claims, and 28 U.S.C. § 1452(a),[3] which permits removal of claims that are "related to" a bankruptcy case. Because our resolution of this controlling question of law will determine

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[1] Because of events occurring subsequent to both the Court's decision as to whether to grant the petitions for interlocutory appeal in *Hevesi v. Citigroup Inc.*, Nos. 03-8044, 03-8045, and oral argument on this appeal, Judge Robert D. Sack, originally a member of the panel, has recused himself. Accordingly, the appeal has been decided by the panel's remaining two judges pursuant to this Court's Local Rule § 0.14(b).

[2] That section provides in relevant part that, with one exception, "no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a).

[3] That section provides:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a). Section 1334, in turn, provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11.

28 U.S.C. § 1334(b) (emphasis added).

whether scores of pending lawsuits are properly in federal court, we have considered this appeal on an interlocutory basis.

Based on our analysis of the relevant statutes, viewed against the backdrop of the scheme of federal jurisdiction laid out in Title 28 of the United States Code, we hold that the conflict between Section 22(a) of the Securities Act and the bankruptcy removal statute must be resolved in favor of bankruptcy removal. For the reasons stated below, we do not agree with the plaintiffs that Section 22(a) of the Securities Act is more "specific" than the bankruptcy removal provision, nor do we believe that Congress granted the plaintiffs an *absolute* choice of forum when it amended the Securities Act in 1998. Instead, we resolve the conflict between the statutes by contrasting the bankruptcy removal statute, which contains no exception for claims arising under an Act of Congress that prohibits removal, with the general removal statute, which applies "[*e*]*xcept* as otherwise expressly provided by an Act of Congress." 28 U.S.C. § 1441(a) (emphasis added). Based on this analysis of the federal jurisdictional scheme as a whole, we conclude that Section 22(a) does not preclude removal of individual actions that are "related to" a bankruptcy case under Section 28 U.S.C. § 1452(a).

BACKGROUND

The following facts are drawn principally from the District Court's Opinion and Order of March 3, 2003. *See In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 312-16 (S.D.N.Y. 2003) ("Remand Opinion"). Further detail is provided both in that opinion and in other opinions of the District Court.

On June 25, 2002, WorldCom announced that it had improperly treated $3.8 billion in ordinary costs as capital expenditures. Within two months of that announcement, at least 20 securities class actions had been filed in the United States District Court for the Southern District of New York

against numerous defendants, including WorldCom,[4] former WorldCom executive officers, underwriters of WorldCom's bond offerings (the "Underwriters"), WorldCom's former directors (the "Directors"), WorldCom's former accountants, and research analysts at a Citigroup unit who issued reports regarding WorldCom ("Citigroup Defendants").[5] In the meantime, numerous securities class actions were also filed in other federal courts around the country.

On August 15, 2002, the class actions in the Southern District were consolidated under the caption *In re WorldCom, Inc. Securities Litigation*. On October 8, 2002, the Judicial Panel on Multi-district Litigation ("MDL Panel") ordered the class actions filed around the country centralized in the Southern District of New York pursuant to 28 U.S.C. § 1407.[6] As a result of this consolidation order, pretrial proceedings in the consolidated securities class action have gone forward in the Southern District of New York before Judge Denise Cote.

Appellants in the instant case are state and private pension funds that bought WorldCom bonds ("the Bondholders"). Rather than joining a class action against WorldCom and the other defendants, the Bondholders, represented by Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss"), have

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[4] WorldCom sought Chapter 11 protection in the Southern District of New York on July 21, 2002. Once WorldCom filed for bankruptcy, the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, took effect, preventing litigation against WorldCom from going forward. Thus, the actions have proceeded against the numerous defendants other than WorldCom.

[5] The names of the defendants are listed in the District Court's opinion. *See* Remand Opinion, 293 B.R. at 313 nn. 2-6.

[6] Separate class actions alleging violations of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, have also been consolidated in the Southern District under the caption *In re WorldCom, Inc. ERISA Litigation*. These actions are not relevant to this appeal.

brought scores of individual actions in state courts around the country. The Bondholders, unlike the class members, do not assert claims under the Securities Exchange Act of 1934 ("1934 Act"); instead, they bring claims *exclusively* under the Securities Act of 1933 ("1933 Act" or "the Act"). Between July 5, 2002 and October 3, 2003, Milberg Weiss filed at least forty-seven of these individual actions on behalf of over 120 plaintiffs in numerous state courts.

The Bondholders' litigation strategy is carefully considered. By limiting their complaints to claims under the 1933 Act, the Bondholders seek to take advantage of Section 22(a) of the Act, which states that, with one exception that is not relevant here, "[*n*]*o case* arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphasis added). In other words, the Bondholders have crafted their complaints in order to avoid removal of their actions to federal court and consolidation of those actions in a single venue.

Despite crafting their complaints in order to avoid federal jurisdiction, the Bondholders have not succeeded in keeping their claims out of federal court. Rather, with WorldCom in bankruptcy, the Bondholders' actions have been removed to federal courts around the country under 28 U.S.C. § 1452(a), which permits removal of actions that fall within the federal courts' bankruptcy jurisdiction as defined by 28 U.S.C. § 1334(b), including actions that are "related to" a bankruptcy. *See* 28 U.S.C. § 1452(a) (permitting removal of a civil action "to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title"); 28 U.S.C. § 1334(b) (providing that "district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11"). The Underwriters and the Directors asserted that the actions were "related to" WorldCom's bankruptcy case by virtue of their

contribution, indemnification, and contractual reimbursement rights against WorldCom.[7] Once the Bondholders' actions were removed to federal court, they were consolidated for pre-trial purposes with the class actions already before Judge Cote.

Had the Bondholders asserted claims under the 1934 Act, the removal of their claims to federal court would have been uncontroversial, because claims under the 1934 Act are otherwise removable under the general removal provision of 28 U.S.C. § 1441. *See* 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . ."). However, because the Bondholders only brought expressly nonremovable claims under the 1933 Act, the removal of those claims to federal court provoked a flurry of motions to remand.

For our purposes, the first relevant motion to remand was filed by the New York City Employees Retirement System ("NYCERS"). While the Bondholders' actions were being removed, NYCERS filed its own individual action in New York state court alleging violations of both the 1933 Act and New York law. When that action was removed to federal court under Section 1452(a), NYCERS filed a motion to remand. At that point, Judge Cote allowed the Bondholders, including the California Public Employees' Retirement System, to intervene in the proceedings on NYCERS' motion and argue for remand of their individual actions as well.

NYCERS and the Bondholders argued in the District Court that their actions should be remanded to the state courts in

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[7] Notably, on September 4, 2002 and March 5, 2003, the United States Bankruptcy Court for the Southern District of New York approved the payment of fees by the WorldCom estate to counsel for the Directors. The estate made payments of fees to counsel in accordance with the Bankruptcy Court's procedures.

which they were filed for two independent reasons: First, they contended that Section 22(a) of the 1933 Act, 15 U.S.C. § 77v(a), provides plaintiffs with an absolute choice of forum, and therefore bars removal of their claims to federal court. Second, they argued that, even if Section 22(a) does not bar removal under Section 1452(a), their actions could not properly be removed under Section 1452(a) because those actions are not "related to" the WorldCom bankruptcy. In support of the latter argument, the Bondholders noted that the defendants' indemnification and contribution claims (1) would not create liability for WorldCom unless a separate action against WorldCom were filed in the bankruptcy court, and (2) were likely to be accorded little or no value in the WorldCom reorganization plan then pending before the United States Bankruptcy Court for the Southern District of New York.

On March 3, 2003, Judge Cote rejected these arguments in a comprehensive opinion denying NYCERS' motion to remand. *See* Remand Decision, 293 B.R. at 317-330. Judge Cote also ordered individual plaintiffs other than NYCERS to submit supplemental briefing to explain why the March 3, 2003 decision denying remand should not apply to them. On May 5, 2003, after supplemental briefing, Judge Cote adopted the reasoning in the March 3, 2003 decision to deny also the Bondholders' motion to remand. *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 WL 21031974 (S.D.N.Y. May 05, 2003). Finally, on May 20, 2003, Judge Cote declined to reconsider her remand decisions. *In re WorldCom, Inc. Sec. Litig.*, 294 B.R. 553 (S.D.N.Y. 2003). In doing so, Judge Cote rejected the Bondholders' argument that the April 14, 2003 filing of WorldCom's Plan of Reorganization with the United States Bankruptcy Court divested the District Court of jurisdiction over the Bondholders' claims. The Court explained that, even if the Plan of Reorganization would limit the defendants' ability to recover from the estate on their in-

demnification and contribution claims, the Court would not be divested of "related to" jurisdiction, because jurisdiction is established based on the facts at the time of removal. *See id.* at 556-57.

On May 28, 2003, the Bondholders filed a motion pursuant to 28 U.S.C. § 1292(b)[8] to certify the orders denying remand for interlocutory appeal. Notwithstanding the *sub judice* status of their application for an interlocutory appeal, on August 8, 2003, the Bondholders filed a petition in this Court for a writ of mandamus directing the District Court to vacate its orders denying their motions to remand.[9] By order dated August 11, 2003, Judge Cote deemed the application for an interlocutory appeal pending before her to have been withdrawn without prejudice. *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 WL 21911067 (S.D.N.Y. Aug 11, 2003).

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[8] In relevant part, § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

28 U.S.C. § 1292(b).

[9] In a separate petition, the Bondholders asked this Court to issue a writ of mandamus directing the District Court to vacate its May 28, 2003 order consolidating their actions with a class action for pretrial purposes and vesting authority for conducting discovery and motion practice in the lead class-action plaintiff. That petition was denied in a brief summary order along with the petition seeking remand. *See In re California Public*, 79 Fed. Appx. 478, 479 (2d Cir. 2003).

On October 31, 2003, this Court denied the petition for a writ of mandamus on the grounds that "[an] interlocutory appeal pursuant to 28 U.S.C. § 1292(b) remains a possible and adequate avenue for appellate review of the District Court's orders" and "petitioners' right to relief in this case is not 'clear and indisputable.'" *In re California Public*, 79 Fed. Appx. 478, 479 (2d Cir. 2003) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)).

After we denied the mandamus petition seeking remand to state court, the Bondholders renewed their motion to certify the orders denying remand for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On December 16, 2003, the District Court granted the motion to certify the May 5 and May 20 Orders insofar as they held that individual Securities Act claims can be removed under 28 U.S.C. § 1452 despite the prohibition against removal contained in Section 22(a). *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 WL 22953644 (S.D.N.Y. Dec. 16, 2003). On January 16, 2004, we accepted the interlocutory appeal, and allowed the parties to supplement the briefs they had submitted in support of and in opposition to the mandamus petition.

Notably, although the District Court certified its May 5 and May 20 Orders insofar as they held that stand-alone 1933 Act claims can be removed under 28 U.S.C. § 1452(a), the Court *declined* to certify the question of whether the individual actions are "related to" the WorldCom bankruptcy. *See id.* at *5. The Court reasoned that the latter question, in contrast to the former, does not involve a controlling question of law as to which there is substantial ground for difference of opinion. *See id.* at *5-6 (applying standard set forth in 28 U.S.C. § 1292(b)). Moreover, in our January 16, 2004 order accepting the interlocutory appeal, we specifically stated that "the district court's [May 5 and May 20] orders meet the requirements of § 1292(b) *insofar as* the district court held

that Securities Act claims can be removed under 28 U.S.C. § 1452 despite the prohibition against removal contained in Section 22(a) of the Securities Act."

Well before we accepted the instant appeal, the District Court began to rule on motions to dismiss individual actions filed by the Bondholders. First, on November 21, 2003, the District Court granted a motion to dismiss one Milberg Weiss action based, *inter alia*, on the statute of limitations applicable to Securities Act claims. *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431 (S.D.N.Y. 2003). Then, on January 20, 2004, the District Court dismissed with prejudice 31 more individual actions. *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2004 WL 77879 (S.D.N.Y. Jan. 20, 2004). On the same date, the Court also refused to extend the February 20, 2004 deadline by which individual plaintiffs either had to opt out of the class or join the class and withdraw their individual actions. *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2004 WL 77694, at *4 (S.D.N.Y. Jan. 20, 2004).

On January 21, 2004, we ordered the parties "to show cause . . . whether, in light of continuing proceedings in the district court, including the district court's dismissal of 31 individual actions brought by Milberg Weiss and its denial of Milberg's request to delay the opt out period of the class action, any order of this court should be issued in aid of our jurisdiction over this appeal." In response, the Bondholders requested that we (1) stay further proceedings in the cases that were initially brought in state court; (2) vacate the district court's November 21, 2003 and January 20, 2004 rulings dismissing individual claims; and (3) extend the time for opting out of the class action until after we had decided this appeal. The defendants initially opposed each of these requests.[10] On February 3, 2004, we entered an order directing

[10] At oral argument, however, counsel for the Underwriters conceded that his clients would not be prejudiced by an order extending the opt-out date.

the District Court "to extend the deadline to opt out of the class action, as well as the accompanying deadline by which plaintiffs who have filed individual actions must move to dismiss their actions voluntarily, until at least 30 days after this Court's mandate issues." As a result of our February 3, 2004 order, which did not address the Bondholders' first two claims for preliminary relief, the Bondholders have not forfeited any right to relief that they would have had in the absence of this appeal.

DISCUSSION

I. The Scope of the Appeal

The District Court granted the Bondholders' motion to certify one question-namely, whether 1933 Act claims can be removed under Section 1452(a) despite the prohibition against removal contained in Section 22(a). The Court denied the Bondholders' motion to certify a second question-namely, whether "related to" jurisdiction lies over the Bondholders' Securities Act claims despite the fact that the defendants' indemnification and contribution claims against WorldCom were likely to be extinguished in a plan of reorganization and, in any event, could not create liability for WorldCom in the absence of a separate action against WorldCom in the bank-ruptcy court. *See In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 WL 22953644, at *9 (S.D.N.Y. Dec. 16, 2003).

Notwithstanding a district court's determination that a particular issue fails to meet the requirements of 28 U.S.C. § 1292(b), our Court "may address any issue fairly included within the certified order," as "it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) (internal quotation marks omitted). Nevertheless, in these circumstances, we will not consider whether the defendants' potential claims against the estate rendered the

Bondholders' actions "related to" WorldCom's bankruptcy, because we agree with the District Court that this question is not "a controlling question of law." 28 U.S.C. § 1292(b).

In its March 3, 2003 Opinion and Order, the District Court found that certain defendants' contribution claims against WorldCom supported "related to" jurisdiction over the Bondholders' actions. "Because the effect of contribution claims on the bankruptcy estate is at the very least 'conceivable,'" the District Court reasoned, "the NYCERS action is related to the bankruptcy and subject to the jurisdiction of this Court." Remand Opinion, 293 B.R. at 321 (applying standard articulated in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992) ("The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have any 'conceivable effect' on the bankrupt estate.")). Having isolated a single basis for jurisdiction—*i.e.*, certain defendants' contribution claims against the estate—the District Court did not decide whether the Directors' indemnification claims against the estate or any other potential claims supported "related to" jurisdiction.

Because at least one alternative basis for "related to" jurisdiction may exist—*i.e.*, the Directors' indemnification claims against the estate—we are not convinced that the Bondholders have raised a "controlling question" that should be reviewed on an interlocutory basis. *See Int'l Soc. for Krishna Consciousness, Inc. v. Air Canada*, 727 F.2d 253, 256 (2d Cir. 1984) (interlocutory appeal inappropriate where "there is a multiplicity of factual possibilities which generates a kaleidoscope of hypothetical legal issues"). Indeed, the District Court has specifically noted, among other things, that WorldCom's payment of the Directors' attorneys' fees may support "related to" jurisdiction over the individual actions,

notwithstanding the director and officer insurance policies held by WorldCom. *See In re WorldCom, Inc. Sec. Litig.*, 2003 WL 22953644, at *5.

We also are not convinced that the Bondholders have raised a "question *of law*." Rather, to the extent the Bondholders argue that there is no "related to" jurisdiction because it has always been evident that the various defendants' claims against the WorldCom estate would be valued at or near zero in any plan of reorganization, they are challenging the District Court's largely factual determination that these claims could conceivably affect the estate. By its plain terms, Section 1292(b) may only be used to challenge legal determinations. *See Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 631 (2d Cir. 1991).[11]

Because the issue is not properly before us, we intimate no view as to whether the Bondholders' claims are "related to" WorldCom's bankruptcy case notwithstanding the tenuous connection between those claims and WorldCom's reorganization process. Instead, we assume for the purposes of this appeal that the Bondholders' actions are "related to" the bankruptcy case, and we limit our inquiry to the one question properly before us: whether the District Court erred when it exercised bankruptcy jurisdiction over generally non-removable claims brought under the Securities Act of 1933.

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[11] Because we agree with the District Court that the question presented is not a controlling question of law, we need not review the District Court's determination that "the Intervenors have not shown that there is a substantial ground for a difference of opinion that their actions are 'related to' the WorldCom bankruptcy under the standard applied in this Circuit." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 WL 22953644, at *7 (S.D.N.Y. Dec. 16, 2003).

II. The Statutory Conflict

A. *Bankruptcy Removal*

The bankruptcy removal provisions, 28 U.S.C. §§ 1452 and 1334, provide that most civil actions related to a bankruptcy case may be removed to federal court. Section 1452(a) states:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a). Jurisdiction under Section 1334 is contingent upon a civil proceeding's relationship to a bankruptcy case. That Section provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11.

28 U.S.C. § 1334(b) (emphasis added).

These provisions were originally included in the Bankruptcy Reform Act of 1978 ("Reform Act" or "Bankruptcy Code"). *See* 28 U.S.C. §§ 1471(b), 1478 (repealed). The Senate Report on the Reform Act explains the purpose of the provisions as follows:

> This broad grant of jurisdiction will enable the bankruptcy courts . . . to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in the State court or in the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court.

S. Rep. No. 95-989, at 153 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939. Similarly, the House Report explains that the breadth conferred by the new jurisdictional provisions was intended to "greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs." H.R. Rep. No. 95-595, at 46 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6007. In sum, Sections 1452(a) and 1334(b) were intended to decrease the litigation costs to the estate resulting from actions arising in or related to a bankruptcy case.

In 1984, a plurality of the Supreme Court concluded that 28 U.S.C. § 1471(c),[12] which provided for broad jurisdiction in bankruptcy courts, was unconstitutional. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982). In response, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (1984). Although that statute revamped the relationship between Article III judges and Article I bankruptcy judges, it did not materially alter the jurisdictional scheme set forth in the Reform Act. *See* 1 Collier on Bankruptcy ¶ 1.02[2] (15th ed. rev. 2003). Thus, Sections 1452(a) and 1334(b), in their current form, can properly be viewed as parts of the Bankruptcy Code.

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[12] That section provided: "The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. § 1471(c) (repealed). A plurality of the Supreme Court concluded that § 1471(c) was unconstitutional because it impermissibly removed "essential attributes of the judicial power" from Article III judges. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

B. *The Securities Act*

The key jurisdictional provision of the 1933 Act is found in Section 22(a), which provides for concurrent state and federal jurisdiction over claims under the Act:

> The district courts of the United States and United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, *concurrent with State and Territorial courts*, except as provided in [section 16] of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

See 15 U.S.C. § 77v(a) (emphasis added). Section 22(a), in addition, specifically bars removal of certain claims brought under the 1933 Act:

> Except as provided in [section 16(c)], no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Id.

Section 16(c) of the Act excepts "class action[s] brought in state court" from the scope of the nonremoval provision and provides that those class actions "*shall* be removable to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c) (emphasis added). Moreover, Section 16(b) of the Act preempts a broad category of state law claims insofar as they are asserted in a securities class action:

> No covered class action *based upon the statutory or common law of any State* or subdivision thereof may be maintained in any State or Federal court by any private party alleging-(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a

> covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b) (emphasis added).

Section 16 of the 1933 Act, in its current form, was added to the Act in 1998, when Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in part, 15 U.S.C. § 77v(a)). SLUSA was the second major federal securities statute passed in the 1990s. In 1995, Congress had passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. 104-67, 109 Stat. 737 (1995). The PSLRA was intended to curtail "strike suits"—*i.e.*, meritless class actions alleging fraud in the sale of securities. *See* H.R. Conf. Rep. No. 105-803 (1998). It aimed to curtail these suits by instituting, among other things, heightened pleading requirements for class actions alleging fraud in the sale of securities. *See* 15 U.S.C. § 78u-4.

SLUSA was enacted after it became evident that the PSLRA had not achieved its purpose. The PSLRA was ineffective in eliminating "strike suits" in large part because class action plaintiffs were able to avoid its strictures by bringing suit in state rather than federal courts. SLUSA, which made federal court the exclusive venue for class actions alleging fraud in the sale of certain securities, closed this loophole in the PSLRA, and expanded federal jurisdiction over class actions. *See generally Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001) (detailing the history of PSLRA and SLUSA).

Like the PSLRA, however, SLUSA did not in any way alter Section 22(a)'s bar on the removal of *individual* Securities Act claims. Accordingly, the statutory conflict between the bankruptcy removal statute and Section 22(a) remains clear: While the bankruptcy removal statute unambiguously

states that any civil action brought by a private party in state court (or any court besides the United States Tax Court) may be removed to federal court if the action is related to a bankruptcy case, Section 22(a) of the Act states, in equally unambiguous terms, that individual actions under the Act may not be removed from state court. Because the Bondholders have brought stand-alone individual claims under the Act that are (presumptively) related to a bankruptcy, we must resolve the conflict between the statutes.

III. Case Law

A. *The District Court's Opinion*

In a thoughtful and thorough opinion, Judge Cote concluded that the bankruptcy removal statute trumps Section 22(a) of the 1933 Act. *See* Remand Opinion, 293 B.R. at 328-30. To reach this conclusion, Judge Cote relied principally on several arguments put forward by the defendants.

First, Judge Cote pointed out that the general removal statute, codified at 28 U.S.C. § 1441(a), provides: "Except as otherwise expressly provided by an Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . ." Section 1452(a), by contrast, contains just two enumerated exceptions: (1) proceedings before the Tax Court and (2) civil actions brought by the government. In Judge Cote's view, under the principle *inclusio unius est exclusio alterius*—that to express or include one thing implies the exclusion of the other—the enumerated exceptions in Section 1452(a) must be viewed as exclusive. Remand Opinion, 293 B.R. at 328-29.

Next, Judge Cote explained that "interpreting Section 1452 to allow removal for all actions over which there is bankruptcy jurisdiction . . . is consistent with the purpose of the Bankruptcy Code"—namely, to preserve assets so that the

estate can be reorganized in an efficient manner. Remand Opinion, 293 B.R. at 329 (S.D.N.Y. 2003).

Finally, Judge Cote relied on our Court's decision in *Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020 (2d Cir. 1984). In *Gonsalves*, an expressly nonremovable Jones Act claim was joined with a claim for unseaworthiness and a maintenance and cure claim. No explicit bar to removal applied to either of the maritime claims, and diversity jurisdiction existed over the maintenance and cure claim. The defendant removed the action as a whole to federal court under 28 U.S.C. § 1441(c). Prior to the enactment of the Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089, § 1441(c) provided that "whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . . ." 28 U.S.C. § 1441(c) (1982).[13]

Although we ultimately held on appeal that the maintenance and cure claim was not sufficiently "separate and independent" of the Jones Act claim to warrant removal of the Jones Act claim under § 1441(c), *see Gonsalves*, 733 F.2d at 1026, we stated first that *if* the joined claims were sufficiently independent to be removed under that provision, Section 1445(a), which makes Jones Act claims nonremovable, would not override Section 1441(c). *See id.* at 1022. In other words, as Judge Cote put it, the Court of Appeals "found that the Jones Act removal bar provided an express exception to removal under Section 1441(a), but did not

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[13] As discussed further below, *see* note 17, *post*, the current version of 28 U.S.C. § 1441(c) only permits removal of generally nonremovable claims when they are joined with a claim that falls within the federal question jurisdiction conferred by 28 U.S.C. § 1331. Thus, a claim that meets the requirements for diversity jurisdiction such as the maintenance and cure claim in *Gonsalves* could no longer satisfy Section 1441(c).

create an exception from the 'additional removal jurisdiction' available under Section 1441(c) for cases that otherwise could not be removed." 293 B.R. at 329. According to Judge Cote, "a similar analysis would mean that Section 22(a)'s bar to the removal of 1933 Act claims would not prevent an action from being removed to federal court if there was a separate, appropriate basis for the removal." *Id.*

B. *Other Decisions*

Judge Cote was the first district judge to resolve the conflict between the Securities Act and the bankruptcy removal statute in favor of removal. Many district courts to address the issue have reached the opposite conclusion. *See Ill. Mun. Ret. Fund v. Citigroup, Inc*, No. 03-465-GPM, 2003 U.S. Dist. LEXIS 16255, at *6 (S.D. Ill. Sept. 9, 2003); *City of Birmingham Ret. & Relief Fund v. Citigroup, Inc.*, No. CV-03-BE-0994-S, 2003 WL 22697225, at *3 (N.D. Ala. Aug. 12, 2003); *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, 2003 U.S. Dist. LEXIS 10266, at *10 (M.D. Tenn. May 12, 2003); *cf. McRae v. Lykes Bros. S.S. Co.*, No. 98-3240, 1998 U.S. Dist. LEXIS 20132 (E.D. La. Dec. 22, 1998) (granting remand to state court because non-removal provision of Jones Act overrides claim of "related to" jurisdiction under §§ 1334 and 1452); *Kinder v. Wis. Barge Line, Inc.*, 69 B.R. 11, 13 (E.D. Mo. 1986) (same). In the most extensive of these opinions, Judge William J. Haynes, Jr. of the Middle District of Tennessee reasoned that the conflict between the statutes should be resolved in favor of Section 22(a) because it is more specific than Section 1452(a). *See Tenn. Consol.*, 2003 U.S. Dist. LEXIS 10266, at *7-11 (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (stating that "a specific statute controls over a general one without regard to priority of enactment")). The Court in that case also noted that Section 22(a) was amended as recently as 1998, when Congress enacted SLUSA. *Id.* at *8.

Since Judge Cote declined to remand the individual actions in the instant case, two more district judges in the Southern District of New York have resolved the conflict between Section 22(a) and Section 1452(a) in favor of Section 1452(a). *See In re Adelphia Communs. Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529, 2003 WL 23018802, at *2 (S.D.N.Y. Dec. 23, 2003) (McKenna, J.); *In re Global Crossing, Ltd. Sec. Litig.*, No. 02 Civ. 910, 2003 WL 21659360, at *3 (July 15, 2003) (Lynch, J.). In *Global Crossing*, Judge Lynch explained that, although SLUSA was enacted in 1998 and "ordinarily, the more recently enacted statute will control where it conflicts with a prior law," *id.*, SLUSA's narrow purpose was to prevent class action plaintiffs from suing in state courts. *Id.* Therefore, in Judge Lynch's view, SLUSA "does not reflect a recent indication of congressional intent regarding the fourteen-year-old conflict between § 1452 and § 22(a)." *Id.* (internal quotation marks omitted). In *Adelphia*, Judge McKenna adopted Judge Lynch's reasoning. *See Adelphia,* 2003 U.S. Dist. LEXIS 23199, 2003 WL 23018802, at *2.[14]

IV. Analysis

We review a district court's denial of a motion to remand *de novo*. *Cicio v. Does*, 321 F.3d 83, 89 (2d Cir. 2003). In reviewing Judge Cote's denial of the Bondholders' motions to remand, we are mindful that "the defendant bears the burden of demonstrating the propriety of removal." *Grimo v. Blue Cross/Blue Shield of Vermont*, 34 F.3d 148, 151 (2d Cir.

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[14] In addition, two district judges in the Central District of California have substantially adopted the reasoning of Judge Cote or Judge Lynch, and refused to remand stand-alone Securities Act claims to state court. *See Carpenters Pension Trust for S. Cal. v. Ebbers*, 299 B.R. 610, 615 (C.D. Cal. 2003) (relying principally on Judge Lynch's reasoning in *Global Crossing*); *Pac. Life Ins. Co. v. J.P. Morgan Chase & Co.*, No. SA CV 03-813-GLT (ANX), 2003 WL 22025158, at *2 (C.D. Cal. June 30, 2003) (relying, *inter alia*, on Judge Cote's March 3, 2003 opinion).

1994); *accord United Food & Commercial Workers Union, Local 919 v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994) ("Where, as here, jurisdiction is asserted by a defendant in a removal petition, it follows that the defendant has the burden of establishing that removal is proper."); *cf. Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 85 L. Ed. 1214, 61 S. Ct. 868 (1941) (directing that removal statutes be given "strict construction"). Based on our analysis of the Securities Act of 1933 and the bankruptcy removal statute, we conclude that the defendants have met their burden in the instant case.

A. *Statutory Language*

Construction of the relevant statutes "must begin with the words of the text." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003). Section 1452(a) states that a party may remove "*any* claim or cause of action in a civil action *other than*" claims falling within two cited exceptions. 28 U.S.C. § 1452(a) (emphases added). Section 22(a), meanwhile, states that "*except* as provided in section 16(c), *no case* arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphases added). The statutes, therefore, contain equally categorical language. While the unambiguous language of the bankruptcy removal statute permits removal of 1933 Act claims that are related to a bankruptcy case, the unambiguous language of the Securities Act forbids removal of such claims.

The direct conflict between the statutes cannot be resolved based on the familiar maxim *inclusio unius est exclusio alterius*. Under that maxim, because Section 1452(a) enumerates the two narrow exceptions that it contemplates, *i.e.*, (1) proceedings before the Tax Court, and (2) civil actions brought by the government, these are the *only* exceptions to removal under the Bankruptcy Code. Under the

same maxim, however, the single exception to Section 22(a), *i.e.*, "class action[s] brought in any state court," 15 U.S.C. § 77p(c), should be treated as the *only* exception to non-removal under the 1933 Act. In sum, the *inclusio unius* maxim, to the extent that it is divorced from the broader statutory framework of Sections 1452(a) and 22(a), is of little value in the instant case. Both Section 22(a) and Section 1452(a) contain exceptions that would, in the absence of a direct statutory conflict, be treated as exclusive.

B. *Specificity*

Despite the direct conflict between the 1933 Act and the bankruptcy removal statute, the Bondholders contend that we can resolve the dispute between the parties without looking beyond the language of these statutes. In particular, the Bondholders claim that Section 22(a) necessarily trumps Section 1452(a) because it is more specific than Section 1452(a). We disagree.

"Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)); *see also Greene v. United States*, 79 F.3d 1348, 1355 (2d Cir. 1996) ("When two statutes are in conflict, that statute which addresses the matter at issue in specific terms controls over a statute which addresses the issue in general terms, unless Congress has manifested a contrary aim."). In determining whether Section 22(a) is more "specific" than Section 1452(a), *Radzanower* itself is instructive. At issue in that case was the proper venue for a suit brought under the 1934 Act against a national banking association. *Radzanower*, 426 U.S. at 149-50. The venue provision of the 1934 Act, 15 U.S.C. § 78aa, allows suits to be brought in any district where the defendant transacts business or may be found, or where the violation occurred. However, the venue provision of the

National Bank Act, 12 U.S.C. § 94,[15] provides that actions against a national banking association "may be had" only in the district where the association is "established". *See id.* at 150. In concluding that the National Bank Act's venue provision is more specific than the 1934 Act's venue provision, the Court reasoned:

> When Congress enacted the narrow venue provisions of the National Bank Act, it was focusing on the particularized problems of national banks that might be sued in the state or federal courts. When, 70 years later, Congress enacted the Securities Exchange Act, its focus was on the objective of promoting fair dealing in the securities markets, and it enacted a general venue provision applicable to the broad universe of potential defendants subject to the prohibitions of that Act. Thus, unless a "clear intention otherwise" can be discerned, the principle of statutory construction discussed above counsels that the specific venue provisions of § 94 are applicable to the respondent bank in this case.

Id. at 153-54.

Having concluded that the venue provision of the National Bank Act is more specific than the venue provision of the 1934 Act, the Supreme Court went on to determine that, when it enacted the 1934 Act, Congress did not express a "clear intention" to repeal the National Bank Act's venue provision by implication. The Court explained that a general statute will not be construed to repeal a specific statute by implication in the absence of an "irreconcilable conflict" between the statutes. *Id.* at 155-56. Because, in the Court's view, application of § 94 to securities actions against banking associations "will not unduly interfere with the operation of the Securities Exchange Act," there is no "irreconcilable conflict" between

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[15] The venue provision of the National Bank Act was enacted in 1878. *Radzanower*, 426 U.S. at 150.

the 1934 Act and the National Bank Act, and the more specific statute controls. *Id.* at 156 (internal quotation marks omitted).

Based on the principles of statutory interpretation articulated in *Radzanower*, we cannot conclude that Section 22(a) is more "specific" than Section 1452(a). First, unlike the National Bank Act's venue provision, which applies to a defined group of *litigants*, Section 22(a), like both Section 1452(a) and the 1934 Act's venue provision, applies to a defined class of *claims*. Thus, the Supreme Court's distinction between a statute applicable to a "broad universe of potential defendants" and a statute that protects a "particularized" group of defendants, *id.* at 153-54, carries no weight here.

Additionally, the class of claims covered by Section 22(a) is no more specific than the class of claims covered by Section 1452(a). Section 22(a) does not cover only a subset of the claims covered by Section 1452(a). By the same token, Section 1452(a) does not cover only a subset of the claims covered by Section 22(a). Rather, just as Section 1452(a) applies to many claims that are not brought under the 1933 Act, Section 22(a) applies to many claims that are not "related to" a bankruptcy.

In that respect, it is instructive to compare Section 1452(a) to the general removal statute, which, "except as otherwise expressly provided by Act of Congress," permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . ." 28 U.S.C. § 1441(a). Even without the introductory clause in Section 1441(a), Section 22(a) would arguably trump that provision on the ground that Section 22(a) is more specific than Section 1441(a); that is, Section 22(a) applies to only one subset of those actions over which "the district courts of the United States have original jurisdiction," while Section

1441(a) covers the whole universe of such actions. By contrast, Section 22(a) does not cover only a subset of the universe of claims that are "related to" a bankruptcy case; rather, it applies to numerous claims that are in no way "related to" a bankruptcy, just as Section 1452(a) applies to numerous claims that are not brought under the 1933 Act.

Finally, even if we were to conclude that Section 22(a) covers a more "specific" group of claims than Section 1452(a), Section 22(a) would not necessarily control. The Supreme Court in *Radzanower* indicated that where the application of a specific statute would "unduly interfere" with the operation of a general statute that was enacted subsequent to the specific statute, the more general statute controls. *See Radzanower*, 426 U.S. at 156. In *Radzanower*, however, the Court determined that the National Bank Act's venue provision would not "unduly interfere" with the operation of the 1934 Act, because (1) the provision "will have no impact whatever upon the vast majority of lawsuits brought under that Act" and (2) "[i]n the tiny fraction of litigation where its effect will be felt, it will foreclose nobody from invoking the Act's provisions." *Id.*

We are not so sanguine about Section 22(a)'s effect on the system created by the Bankruptcy Code. When Congress enacted Section 1452(a) in 1984, fifty years after it first enacted Section 22(a), "Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with *all* matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (emphasis added and internal quotation marks omitted). Therefore, Congress crafted Section 1452(a) to allow removal in a broad array of situations. First, unlike Section 1441(a), which authorizes *defendants* to remove, the bankruptcy removal statute authorizes *any* "party," including plaintiffs, to remove. *See* 28 U.S.C. § 1452(a). Second,

because any *one* "party" can remove under Section 1452(a), removal under that provision, unlike removal under Section 1441(a), does not require the unanimous consent of the defendants. *See Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 660 (4th Cir. 1985). Third, whereas the general removal statute, § 1441(a), contemplates removal only from state court, there is no such limitation in Section 1452(a). *See, e.g., Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1572 (Fed. Cir. 1995) (holding that removal of an action from the Court of Federal Claims to federal district court was proper under Section 1452(a)). Accordingly, in its every detail, Section 1452(a) is designed to further Congress's purpose of centralizing bank-ruptcy litigation in a federal forum. *See In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 117 (2d Cir. 1992) (noting "the strong bankruptcy code policy that favors centralized and efficient administration of all claims in the bankruptcy court"); *In re Pan Am. Corp.*, 950 F.2d 839, 845 (2d Cir. 1991) (similar).

Were Section 22(a) construed to trump Section 1452(a), Section 22(a) could interfere with the operation of the Bankruptcy Code, especially in large chapter 11 cases. *Cf. Celotex*, 514 U.S. at 310 (noting that "related to" jurisdiction may extend more broadly when it concerns a reorganization under Chapter 11 as opposed to a liquidation under Chapter 7). When a debtor seeks to reorganize, as WorldCom has, its plan of reorganization must resolve all lawfully pending liabilities, and, to do so, the plan must marshal and allocate all of the debtor's assets. Regardless of whether the defendants' contribution or indemnification claims in this particular case ultimately had a material impact on World-Com's final plan of reorganization, it is apparent that contribution and indemnification claims can, in some circumstances, affect the administration of a bankrupt estate. *Cf. In re Enron Corp. Sec., Derivative & "ERISA" Litigation*, No. G-02-0299, 2002 WL 32107216, at *7 (S.D. Tex. May 6,

2002) (predicting a "significant impact on Enron's bankrupt estate should [J.P. Morgan's] potential claims for indemnity and contribution [against Enron] succeed"). Because, in any given case, the full amount of damages sought under the 1933 Act can be the basis for a claim against the estate, the policy underlying Section 1452(a) applies with full force to claims under the Act. Section 1452(a) dictates that these claims, when they are brought against defendants with contribution rights, should not be subject to conflicting outcomes along with repetitive and time-consuming discovery proceedings in multiple state courts.

In sum, because Section 22(a) does not cover a narrower class of claims than Section 1452(a), it cannot be considered more "specific" than Section 1452(a). Moreover, even if Section 22(a) were more specific than Section 1452(a), *Radzanower* counsels that, because Section 22(a) could interfere with the operation of the Bankruptcy Code, it would not necessarily control.

C. *Rule of Recency*

The Bondholders argue further that Section 22(a), which was amended by SLUSA in 1998, trumps Section 1452(a), which was enacted in 1984, because Section 22(a) is the more recently enacted statute. Once again, we disagree.

It is well established that "when two statutes are in irreconcilable conflict, we must give effect to the most recently enacted statute since it is the most recent indication of congressional intent." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 991 (2d Cir. 1990). However, it is also well established that "repeals by implication of jurisdictional statutes . . . are disfavored." *Henderson v. INS*, 157 F.3d 106, 119 (2d Cir. 1998). Based on the second principle, the mere fact that Section 22(a) was amended in 1998 is not particularly proba-

tive.[16] In order to convince us that Section 22(a) trumps Section 1452(a) as a result of SLUSA, the Bondholders would need to show that, when it enacted SLUSA, Congress intended to give individual plaintiffs an *absolute* choice of forum for claims brought under the 1933 Act.

The Bondholders cannot make this showing, because nothing in the text or legislative history of SLUSA indicates that Congress intended to alter the jurisdictional scheme applicable to *individual* actions under the 1933 Act. Indeed, given Congress's focus in 1998 on *expanding* federal jurisdiction, "[i]t would be ironic . . . to read SLUSA. . . as implicitly *contracting* federal jurisdiction by reversing, without comment in either text or legislative history, the bankruptcy removal statute's effect on the prior removal scheme." *In re Global Crossing, Ltd. Sec. Litig.*, 2003 WL 21659360, at *3. SLUSA, which merely expanded federal jurisdiction over class actions, offers no support to the Bondholders.

That is not to say that SLUSA, which left the 1933 Act's nonremoval provision intact, can be used *against* the Bondholders. All we conclude here is that, in light of its complete silence in 1998 with respect to individual Securities Act claims that are related to a bankruptcy case, Congress did not alter any preexisting rule when it enacted SLUSA. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) (explaining that Congress's "comprehensive reexamination and significant amendment" of the

[16] The amendment of Section 22(a) in 1998 is also of diminished significance in light of the fact that Section 1452(a) was enacted well after the original version of Section 22(a). *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 ("We do not believe that [28 U.S.C.] § 2411(a) can fairly be regarded as a later enactment than § 3771(e) [of the Internal Revenue Code of 1939], for at the time § 3771(e) was enacted, in 1942, a predecessor provision of § 2411(a) had long been on the books.").

Commodities Exchange Act, which left intact a provision of the Act under which courts implied a cause of action, "is itself evidence that Congress affirmatively intended to preserve" that implied cause of action).[17]

D. *Statutory Framework*

Because Congress did not manifest an intent to alter pre-existing law when it amended the 1933 Act in 1998, we cannot resolve the statutory conflict by focusing on SLUSA. Thus, we turn our attention to Section 1452(a). That statute, which was enacted over fifty years after the Securities Act of 1933, does not refer to the 1933 Act. However, unlike the general removal statute, 28 U.S.C. § 1441(a), Section 1452(a) contains no exception for federal claims that are expressly nonremovable under an Act of Congress. Based on this crucial distinction *within* the federal jurisdiction scheme of Title 28, we conclude that, unlike the general removal statute, Section 1452(a) does not except individual claims brought under the Securities Act.

Section 1441, as we have noted, is the general removal provision of the Judicial Code of 1948, and it is based mainly on an analogous provision in the Judicial Code of 1911. *See* 16 James William Moore *et al.*, *Moore's Federal Practice* § 107App. 100[2] (3d ed. 2002). Section 1441(a) provides that "[*e*]*xcept as otherwise expressly provided by Act of Congress*, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be

[17] Some commentators have called this principle the "dog didn't bark" canon, or "the presumption that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule." William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 101 (1994) (citing *Chisom v. Roemer*, 501 U.S. 380, 396 & n. 23 (1991)).

removed . . . to the district court of the United States for the District and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (emphasis added). Section 1441(c), in turn, now provides as follows: "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title [federal question jurisdiction] is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . . ." 28 U.S.C. § 1441(c).[18] Thus, except in those instances where Congress has expressly forbidden removal, Section 1441 permits defendants to remove any claim that could be brought in federal court as well as any claim that is joined with a claim premised on federal law.

Like Section 1441(c) but unlike Section 1441(a), Section 1452(a) does not contain an exception for claims arising under an Act of Congress that otherwise prohibits removal. Rather, § 1452(a) states that "[a] party may remove *any* claim or cause of action . . . ." 28 U.S.C. § 1452(a) (emphasis

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[18] This version of the provision is narrower than its predecessor. Under the pre-1990 version of the provision, which was in force when our Court decided *Gonsalves*, "a separate and independent claim or cause of action" could be removed as long as it was joined with *any* claim or action that could be removed "if sued upon alone." 16 James William Moore et al., *Moore's Fed. Prac.* § 107App. 09[1] (3d ed. 2002). By contrast, under the amended version of the statute, "a separate and independent claim or cause of action" may be removed only if it is joined with a claim that falls "within the [federal question] jurisdiction conferred by [28 U.S.C. § 1331]." *See id.* Thus, unlike when *Gonsalves* was decided, the existence of a claim that meets the requirements for diversity jurisdiction is no longer sufficient to implicate Section 1441(c). Instead, Section 1441(c) may only be invoked when a generally nonremovable claim is joined with a *federal* claim that is removable under Section 1441(a). *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. § 109 (1990) (explaining that "removal of [federal question] cases is possible under Sec. 1441(a)" and that the amended version of Section 1441(c) is meant to "establish a basis of removal that would avoid the need to decide whether there is pendant jurisdiction").

added). The absence of a such a crucial exception in the language of Section 1452(a) suggests that, in 1978, when it originally enacted Section 1452(a) as part of the Bankruptcy Code, Congress did not intend for Section 22(a) and its analogues to bar removal of "related to" claims. *Cf. Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) ("Where Congress includes particular language in one section of a statute but it omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

Under the Bondholders' reading of the relevant statutes, according to which Section 22(a) trumps not only Section 1441(a) but also Section 1452(a), the key words "[e]xcept as otherwise expressly provided by Act of Congress" in Section 1441(a) would be surplusage. In other words, if we concluded that a nonremoval provision such as Section 22(a) prevents removal under *both* Section 1441(a) and Section 1452(a), notwithstanding the phrase "except as otherwise expressly provided by Act of Congress" in Section 1441(a), that phrase in the general removal statute would serve no apparent purpose.

Statutes should be construed, if possible, to give effect to every clause and word. *See e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995). Although "[s]urplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute," *Lamie v. United States Trustee*, 124 S. Ct. 1023, 1031 (2004), there is no benefit whatever to interpreting the introductory clause of Section 1441(a) as surplusage. By contrast, if we give effect to every clause in Section 1441(a), the statutory conflict between Section 1452(a) and Section 22(a) dissolves. In these circumstances, we should avoid an

interpretation of Section 1452(a) that renders a key clause of Section 1441(a) unnecessary.

Our decision in *Gonsalves*, although not directly controlling, supports a reading of Section 1452(a) that gives effect to every clause in Section 1441(a). In *Gonsalves*, we stated in *dicta*[19] that the pre-1990 version of 28 U.S.C. § 1441(c), which permitted removal of nonremovable claims that are joined with a removable claim, trumped the provision of the Jones Act forbidding removal of stand-alone Jones Act claims. *Gonsalves*, 733 F.2d at 1022-23.

As an initial matter, we note that the plaintiff in *Gonsalves*, unlike the Bondholders, *chose* to join removable claims with otherwise nonremovable claims and therefore "accepted the risk of removal." *Id.* at 1026. Here, by contrast, by asserting individual claims under the 1933 Act, and wholly eschewing the 1934 Act, the Bondholders manifestly did not assume the risk of removal. Thus, the assumption-of-risk logic that underlay *Gonsalves* has no application here.

Nevertheless, *Gonsalves* is instructive insofar as we explained in that case that "there is no indication in the text of Section 1441(c) that Congress intended to confine the meaning of a 'non-removable' claim to claims over which a federal district court would not have original subject matter jurisdiction." 733 F.2d at 1023. The same analysis applies to

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[19] The relevant portion of *Gonsalves* is *dicta* because our Court in that case did not have to determine whether 28 U.S.C. § 1441(c) trumped the Jones Act's nonremoval provision in order to conclude that the plaintiff's maintenance and cure claim was not sufficiently "separate and independent" of the Jones Act claim to satisfy the requirements of Section 1441(c). *See Black's Law Dictionary* 1100 (7th ed. 1999) (defining "obiter dictum" as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)"); *cf. id.* at 737 (defining "holding" as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision").

the bankruptcy removal statute. Like Section 1441(c), Section 1452(a) permits the removal of certain actions that cannot be removed under Section 1441(a)-namely, with two exceptions, all civil actions that are "related to" to a bankruptcy case. The statute invites no distinction between, on the one hand, those "related to" actions over which a federal district court lacks original jurisdiction and, on the other hand, those "related to" actions over which a federal district court has original jurisdiction but lacks removal jurisdiction based on an Act of Congress.

Were we to read that distinction into the text of Section 1452(a), we would essentially be pasting the introductory clause of Section 1441(a)—"except as otherwise expressly provided by Act of Congress"—into Section 1452(a). In light of the principles articulated in *Gonsalves*, we see no need to do such violence to the statutory scheme. *Gonsalves* teaches that when an anti-removal provision such as Section 22(a) is invoked, the threshold question is whether removal is being effectuated by way of the general removal statute, 28 U.S.C. § 1441(a), or by way of a separate removal provision that "grants *additional* removal jurisdiction in a class of cases which would not otherwise be removable under the prior grant of authority." *Id.* at 1022 (quoting *U.S. Industries, Inc. v. Gregg*, 348 F. Supp. 1004, 1015 (D. Del. 1972) (emphasis added)). If removal is being effectuated through a provision that confers *additional* removal jurisdiction, and that provision contains no exception for nonremovable federal claims, the provision should be given full effect. *See id.* at 1022-23. Based on these principles, we indicated in *Gonsalves* that Section 1441(c) confers removal jurisdiction over *all* "otherwise non-removable" claims that are joined with removable claims, including claims grounded on federal law that may not be removed to federal court. Here, we apply the same principles to Section 1452(a), and hold that, with two enumerated exceptions, Section 1452(a) confers removal jurisdiction over *all* claims "related to" a bankruptcy case.

CONCLUSION

We decline to interpret the key introductory clause in Section 1441(a) as surplusage, or to create a distinction between two classes of "related to" claims that is wholly absent from the bankruptcy removal statute. Accordingly, we hold that generally nonremovable claims brought within the Securities Act of 1933 may be removed to federal court if they come under the purview of 28 U.S.C. § 1452(a), which confers federal jurisdiction over claims that are related to a bankruptcy case. In so holding, we do not decide whether the particular claims at issue in this case come within the purview of 28 U.S.C. § 1452(a). Instead, we simply affirm the District Court's decision to assert jurisdiction over the Bondholders' individual Securities Act claims despite the conflict between Section 22(a) and Section 1452(a).

APPENDIX B

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

MASTER FILE 02 Civ. 3288 (DLC), 02 Civ. 8981 (DLC)

IN RE WORLDCOM, INC. SECURITIES LITIGATION;
This Document Relates to: NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Plaintiffs,

vs.

BERNARD J. EBBERS, *et al.*,
Defendants.

March 3, 2003, Decided
March 4, 2003, Filed

OPINION AND ORDER

DENISE COTE, *District Judge*:

On October 29, 2002, New York City Employees' Retirement System and other New York City pension systems filed suit in New York state court against defendants connected to the telecommunications giant WorldCom, Inc. ("WorldCom"). The suit alleges federal securities law and state law claims but does not state claims against WorldCom, which had filed for bankruptcy several months earlier.

Defendants removed this action, and those like it, on the basis of the litigation's relationship to WorldCom's bankruptcy. That relationship is the focus of this Opinion. This Opinion examines the propriety of removal and addresses whether the New York state court action is so related to the

WorldCom bankruptcy that there is federal subject matter jurisdiction over it pursuant to Title 28, United States Code, Section 1334(b).

Having pleaded their complaint to avoid both removal to federal court and the inevitable consolidation with the other civil litigation brought in the wake of WorldCom's financial disclosures in 2002, plaintiffs have moved to remand their action to state court pursuant to 28 U.S.C. § 1447 for lack of subject matter jurisdiction or on equitable grounds pursuant to 28 U.S.C. 1452(b). In the alternative, plaintiffs move for the Court to abstain pursuant to 28 U.S.C. §§ 1334(c)(1) or (c)(2). For the reasons stated below, plaintiffs' motion, brought in the New York City Employees' Retirement System action, is denied. Plaintiffs in the other removed actions will be given an opportunity to show why the analysis in this Opinion does not control any motion to remand filed in their cases.

Background

On June 25, 2002, WorldCom, once the second largest telecommunications company in the world, announced that it had, among other things, improperly treated more than $ 3.8 billion in ordinary costs as capital expenditures in violation of generally accepted accounting principles and would have to restate its publicly-reported financial results for 2001 and the first quarter of 2002. Since its June announcement, World-Com has made further disclosures suggesting that all of its financial results since at least 1999 must be restated.

WorldCom's announcements provoked responses from a variety of public and private quarters. On June 26, 2002, the SEC filed a civil complaint against the company. The next day, the U.S. House of Representatives Committees on Energy and Commerce and on Financial Services initiated investigations of the company. And in July and August, the United States Attorney for the Southern District of New York

filed criminal charges against various former officers of WorldCom.[1]

Even before WorldCom's June 25 announcement, on April 30, 2002, the first securities class action in connection with these events was filed in this district. By August, at least twenty related class actions had been filed here. By Order dated August 15, 2002, they were consolidated under the caption *In re WorldCom, Inc. Securities Litigation* ("*Securities Litigation*"). The New York State Civil Retirement Fund was appointed lead plaintiff, and filed a Consolidated Amended Complaint ("Complaint") on October 11. Two actions alleging that WorldCom and certain WorldCom fiduciaries breached fiduciary duties under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, were consolidated by Order dated September 18, under the caption *In re WorldCom, Inc. ERISA Litigation.*

Meanwhile, numerous class actions—including securities or ERISA claims—were being filed around the country. On October 8, the Judicial Panel on Multi-District Litigation ("MDL") ordered WorldCom-related class action cases centralized in this Court pursuant to 28 U.S.C. § 1407. In addition, lawsuits asserting individual as opposed to class claims were filed by a number of pension funds, among others, in venues across the country. Many of these lawsuits, referred to herein as the Individual Actions, were filed in state court.

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[1] The facts relating to the criminal charges are set forth more fully in this Court's opinions in *In re WorldCom, Inc. Securities Litigation*, 234 F. Supp. 2d 301 (S.D.N.Y. 2002), and *In re WorldCom, Inc. Securities Litigation*, No. 02 Civ. 3288 (DLC), 2002 WL 31729501, at *2-7 (S.D.N.Y. Dec. 5, 2002). Familiarity with these opinions is presumed.

WorldCom took refuge under the federal bankruptcy laws by filing for Chapter 11 bankruptcy in the Bankruptcy Court of this District on July 21, 2002. Once WorldCom filed for bankruptcy, the automatic stay provisions of the bankruptcy laws took effect, preventing litigation against WorldCom itself from going forward. Thus, the *Securities Litigation* before this Court is proceeding against certain former WorldCom executive officers[2], underwriters of WorldCom's bond offerings ("Underwriter Defendants")[3], WorldCom's directors (or former directors) ("Director Defendants")[4], WorldCom's accountants ("Andersen Defendants")[5], and those associated with Salomon Smith Barney who issued or are responsible for financial analyst reports regarding WorldCom ("SSB Defendants")[6]. WorldCom, Inc. is identified by the Complaint, however, as a "related non-party."

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[2] As named in the Complaint, these defendants include Bernard J. Ebbers, Scott D. Sullivan, David F. Myers, and Buford Yates, Jr.

[3] As identified in the Complaint, the Underwriter Defendants in the *Securities Litigation* consist of Salomon Smith Barney, Inc., J.P. Morgan Chase & Co., Banc of America Securities LLC, Deutsche Bank Securities Inc., now known as Deutsche Bank Alex. Brown Inc., Chase Securities Inc., Lehman Brothers Inc., Blaylock & Partners L.P., Credit Suisse First Boston Corp., Goldman, Sachs & Co., UBS Warburg LLC, ABN/AMNRO Inc., Uitendahl Capital, Tokyo-Mitsubishi International plc, Westdeutsche Landesbank Girzentrale, BNP Paribas Securities Corp., Caboto Holding SIM S.p.A., Fleet Securities, Inc., and Mizuho International plc.

[4] As identified in the Complaint, the WorldCom Director Defendants in the *Securities Litigation* consist of Clifford Alexander, Jr., James C. Allen, Judith Areen, Carl J. Aycock, Max E. Bobbitt, Francesco Galesi, Stiles A. Kellett, Jr., Gordon S. Macklin, John A. Porter, Bert C. Roberts, Jr., John W. Sidgmore, and Lawrence C. Tucker.

[5] As identified in the Complaint in the Securities Litigation, the Andersen Defendants include Arthur Andersen LLP, Andersen UK, Andersen Worldwide SC, Mark Schopper, and Melvin Dick.

[6] Although not defined as a group in the Complaint, the SSB Defendants in the *Securities Litigation* include defendants Salomon Smith

In addition to staying litigation, the bankruptcy statute, 28 U.S.C. § 1452 ("Section 1452"), provides for the removal from state court to federal court of actions "related to" a bankruptcy. Actions that had been commenced in state court were removed pursuant to Section 1452(a) as "related to" the WorldCom bankruptcy and transferred to this Court pursuant to order of the MDL panel. Thus far, over forty actions have been transferred by the MDL panel and, with the exception of any ERISA cases, will be consolidated for pretrial purposes pursuant to the Order of December 23[7] in the *Securities Litigation*. Some, if not all, of the plaintiffs in the Individual Actions that were removed have moved to remand their actions to the state courts from which they came.

Pursuant to the MDL Order, cases continue to be transferred to and consolidated in this Court. Meanwhile, the litigation is moving forward. As noted, the *Securities Litigation* was consolidated and plaintiffs' counsel was appointed in August. By Order dated November 21, the discovery stay imposed pursuant to Section 21D(b)(3)(B) of the Securities Exchange Act of 1934 ("1934 Act"), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(3)(B), was modified to permit plaintiffs in the *Securities Litigation* to obtain copies of certain documents and materials that WorldCom had already produced to governmental authorities and certain documents produced in

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Barney, Inc., Citigroup, Inc., and Jack B. Grubman. Consequently, Salomon Smith Barney is listed in two groups of defendants.

[7] The December 23 Order entered in the *Securities Litigation* granted the application of certain defendants to consolidate the Individual Actions with the *Securities Litigation* for pretrial purposes. In light of the motions for remand being made in certain Individual Actions, the December 23 Order provided that after the decision on the motion for remand being made in the instant case—that is, after today—counsel for lead plaintiff in the *Securities Litigation* and for plaintiffs in any Individual Actions remaining before this Court would present a proposed order for consolidation for pretrial purposes.

connection with WorldCom's internal investigation. By Opinion and Order dated December 5, motions for stays of litigation and discovery regarding certain individual defendants were decided. SSB Defendant's motion to sever Counts IX, X and XI of the Complaint is fully briefed and was argued on February 13, 2003. At the same hearing, the Court heard argument on discovery issues regarding the confidentiality of the documents to be produced pursuant to the November 21 Order. Motions to dismiss the *Securities Litigation* Complaint, or parts thereof, were fully briefed by certain defendants on January 31. The *ERISA Litigation* is moving forward at a similar tempo. Motions to dismiss the *ERISA Litigation* were fully submitted on February 28, 2003.[8]

A motion to remand one of the Individual Actions is addressed in this Opinion. New York City Employees' Retirement System ("NYCERS") and eight other New York City pension funds,[9] filed an action in New York state court on October 29, 2002, alleging violations of the Securities Act of 1933 ("1933 Act") and common law fraud arising out of their purchase of WorldCom stocks and bonds from 1999 through June 25, 2002. NYCERS's complaint states four causes of action: (1) against all defendants for violation of Section 11 of the 1933 Act, 15 U.S.C. § 77k ("Section 11") based on false and misleading statements in connection with the May 2000 and May 2001 WorldCom bond offerings;

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[8] Merrill Lynch's motion to dismiss will be fully submitted on March 14, 2003.

[9] The plaintiffs in the NYCERS action are actuarial pension systems for municipal employees of New York City. The plaintiffs are, in addition to NYCERS, the New York City Teachers' Retirement System, New York City Fire Department Pension Fund, New York City Police Department Pension Fund, New York City Board of Education Retirement System, New York City Police Superior Officers' Variable Supplements Fund, New York City Fire Officers Variable Supplements Fund and New York City Teachers' Retirement System Variable Annuity A Program.

(2) against its officer and director defendants for violations of Section 11 while acting in their alleged capacities as "controlling persons" as defined by Section 15 of the 1933 Act, 15 U.S.C. § 77o ("Section 15"); (3) for common law fraud against certain defendants for making false or misleading statements in connection with WorldCom securities; and (4) against certain defendants for aiding and abetting that common law fraud.

With the exception of the underwriters, there is a substantial overlap between the defendants named in the NYCERS action and those named in the Complaint.[10] NYCERS names two of the four individual defendants named in the Complaint. The "NYCERS Director Defendants" include an additional director. Of the Anderson Defendants, NYCERS named only one, Arthur Andersen. NYCERS named the same SSB Defendants. Of the sixteen Underwriter Defendants, however, NYCERS named only six and added three additional underwriters (together, "NYCERS Underwriter Defendants"). The action was removed by the NYCERS Director Defendants on November 8. NYCERS filed a motion to remand, which was fully submitted on January 31.

Plaintiffs in numerous Individual Actions who are each represented by Milberg Weiss Bershad Hynes & Lerarch LLP ("Milberg Weiss") have been permitted to intervene in NYCERS's motion so that their arguments concerning the

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[10] This footnote sets forth the difference between the defendants named by NYCERS and the defendants named in the Complaint and identified in nn. 2, 4-6 *supra*. NYCERS names Bernard J. Ebbers and Scott D. Sullivan. Unlike lead plaintiff, NYCERS did not name David F. Myers or Buford Yates. All of the Director Defendants are named in NYCERS's complaint. In addition, NYCERS names Juan Villalonga as a defendant. All of the SSB Defendants are named in NYCERS's complaint. The only Andersen Defendant NYCERS named is Arthur Andersen LLP: Andersen UK, Andersen Worldwide SC, Mark Schopper and Melvin Dick were not named by NYCERS.

issue of removal can be heard on an expedited basis.[11] These plaintiffs (jointly as represented by Milberg Weiss, "Intervenors"), which are private and public pension funds, have separately filed at least twelve Individual Actions (the "Milberg Weiss Actions") in state courts.[12] Milberg Weiss represents that it is continuing to add similar clients and lawsuits. Unlike the NYCERS complaint, the Milberg Weiss Actions include simply federal claims, specifically, claims under Sections 11 and 12 of the 1933 Act, 15 U.S.C. §§ 77k and 77l.

For example, one of the earliest Milberg Weiss Actions was the action filed by California Public Employees Retirement Systems ("CALPERS") on July 15, 2002 in Los Angeles Superior Court. It named WorldCom as a defendant, as well as many of the defendants in the NYCERS action and in the Complaint.[13] It pleads a single cause of action—a Section 11 claim—based on the May 2001 WorldCom bond offering.

If the Milberg Weiss Actions or NYCERS had pleaded federal securities law claims that are customarily included in complaints where there are allegations of substantial wrongdoing in connection with securities, for example a claim for fraud under Section 10(b)(5) of the 1934 Act, 15

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[11] By stipulation so ordered by this Court on December 20, Milberg Weiss agreed to withdraw its objections to the MDL's November 2 Conditional Transfer Order on the condition that it be allowed to intervene in NYCERS's motion to remand.

[12] The Milberg Weiss Actions were filed in Illinois, California, Ohio, West Virginia, Montana, Washington, Minnesota and Wisconsin, among other places.

[13] CALPERS names WorldCom, Inc., Bernard J. Ebbers, Scott D. Sullivan, J.P. Morgan Chase & Co., Banc of America Securities LLC, Deutsche Bank Alex. Brown, Inc., ABN/AMNRO Inc., J.P. Morgan Securities, Inc., Deutsche Bank AG, Bank of America Corp., Arthur Andersen LLP, and all of the NYCERS Director Defendants.

U.S.C. § 78j(b) (1994), or class rather than individual claims, the lawsuits would have been removable pursuant to the federal question removal provision of 28 U.S.C. § 1441, or pursuant to 15 U.S.C. § 77p, the class action removal provision of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("SLUSA") (codified in scattered sections of Title 15 of the United States Code).

By limiting their complaints to individual (as opposed to class action) 1933 Act claims, Intervenors sought to take advantage of a provision of the 1933 Act that bars ordinary federal question removal of Section 11 and Section 12 claims brought in state court actions, a provision which remained unchanged by the revisions Congress enacted in 1998 when it passed SLUSA. *See* 15 U.S.C. § 77v(a). Intervenors contend that their narrowly styled complaints may not be removed and seek to continue to litigate them separately in the numerous state court jurisdictions in which they have been filed.

The Arguments

NYCERS argues that the removal of its action was unjustified and that its action must be remanded to state court. NYCERS claims that this Court lacks subject matter jurisdiction over this action because the action does not "arise under" the bankruptcy laws and does not "arise in" and is not "related to" the bankruptcy action. In addition, NYCERS contends that even if this action is "related to" WorldCom's bankruptcy, abstention is required by Section 1334(c)(2) of Title 28, United States Code ("Section 1334(c)(2)"), or warranted in the exercise of discretion under Section 1334(c)(1) of Title 28, United States Code ("Section 1334(c)(1)"). Failing that, it argues for remand based on equitable grounds. Intervenors raise similar arguments,[14] but also argue that

[14] Where NYCERS and Intervenors raise the same arguments, this Opinion refers to "NYCERS," including in that reference the arguments

because their Individual Actions raise claims solely under Sections 11 and 12, removal is barred by 15 U.S.C. § 77v(a) ("Section 22(a)") of the 1933 Act.

The NYCERS Underwriter Defendants and NYCERS Director Defendants (collectively, "NYCERS Defendants") both argue that this action is properly before this Court. They argue that subject matter jurisdiction exists because the NYCERS action is "related to" WorldCom's bankruptcy principally through the indemnification and contribution rights these Defendants have asserted against WorldCom, as well as the insurance policies under which NYCERS Director Defendants are covered by reason of their association with WorldCom. These Defendants contest Intervenors' interpretation of the securities laws as an absolute bar to removal, and urge against abstention or remand.

The Securities Industry Association ("SIA") has submitted an *amicus curiae* brief. The SIA represents securities firms including investment banks, broker-dealers, and mutual fund companies. Like the NYCERS Defendants, the SIA argues that the various indemnification and contribution rights affect WorldCom's bankruptcy, and thus create "related to" jurisdiction. In particular, the SIA focuses on the significance of indemnification and contribution agreements as mechanisms to allocate risk among participants in the securities industry.

The issues raised by the motion to remand are addressed in the following order: (1) whether there is jurisdiction over the action as a proceeding "related to" the WorldCom bankruptcy; (2) whether Section 22(a) of the 1933 Act bars removal; (3) whether removal requires the unanimous consent of the named defendants; (4) whether abstention is required pursuant to Section 1334(c)(2); (5) whether abstention is

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made by Intervenors. Arguments made solely by Intervenors are attributed as such.

appropriate pursuant to Section 1334(c)(1); and (6) whether a remand is warranted on equitable grounds.

Discussion

A party seeking to remove an action from state to federal court bears the burden of proving federal jurisdiction. *See Linardos v. Fortuna*, 157 F.3d 945, 947 (2d Cir. 1998) ("It is also hornbook law that the party invoking federal jurisdiction bears the burden of proving facts to establish that jurisdiction."); *Pan Atl. Group, Inc. v. Republic Ins. Co.*, 878 F. Supp. 630, 638 (S.D.N.Y. 1995) (DLC) (removal jurisdiction). If there is doubt as to whether federal jurisdiction exists, remand is appropriate. *See Pan Atl. Group*, 878 F. Supp. at 638.

I. Removal and Federal Jurisdiction under the Bankruptcy Code

Pursuant to statute, cases filed in state court may be removed to federal court if they are sufficiently related to bankruptcy proceedings. Section 1452(a) permits the removal to federal court of any claim over which a federal district court has jurisdiction pursuant to Section 1334 of Title 28 of the United States Code ("Section 1334"). Section 1452(a) states:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a). Jurisdiction under Section 1334 is contingent upon a proceeding's relationship to a bankruptcy case. Section 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings *arising under title 11, or arising in or related to cases under title 11.*

28 U.S.C. § 1334(b) (emphasis supplied).

None of the parties to the NYCERS action contends that it is a proceeding "arising under" Title 11 or "arising in" a Title 11 case. Thus, the jurisdictional debate centers on whether the NYCERS action—consisting of allegations against NYCERS Underwriter Defendants and NYCERS Director Defendants, among others, for violations of Sections 11 and 15 and violations of state laws—are "related to" the WorldCom bankruptcy.

In enacting Section 1334(b) "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citation omitted). Consequently, while "related to" jurisdiction is not "limitless" it does encompass "more than simply proceedings involving the property of the debtor or the estate." *Id.* Moreover, "related to" jurisdiction may extend more broadly when it concerns a reorganization under Chapter 11 as opposed to a liquidation under Chapter 7. *Id.* at 310.

The dominant standard for "related to" jurisdiction is that set forth by the Third Circuit in *In re Pacor, Inc.*, 743 F.2d 984 (3d Cir. 1984). The *Pacor* test states that a civil proceeding is "related to bankruptcy" if "the outcome of that

proceeding could *conceivably have any effect* on the estate being administered in bankruptcy." *Id.* at 994 (emphasis in original partially removed); *see Celotex*, 514 U.S. at 308 n.6. For a federal court to have "related to" jurisdiction over an action,

> the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Celotex, 514 U.S. at 308 n.6 (citation omitted). Many circuit courts have derived their standard for "related to" jurisdiction from the *Pacor* standard. *See, e.g., Arnold v. Garlock*, 278 F.3d 426, 434 (5th Cir. 2001); *In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999); *In re Dow Corning Corp.*, 86 F.3d 482, 489 (6th Cir. 1996); *In re G.S.F. Corp.*, 938 F.2d 1467, 1476 (1st Cir. 1991); *In re Titan Energy, Inc.*, 837 F.2d 325, 330 (8th Cir. 1988); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986).

The Second Circuit clarified its reliance on the *Pacor* test in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992).[15]

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[15] As the Supreme Court pointed out in *Celotex Corp.*, in *In re Turner*, 724 F.2d 338 (2d Cir. 1983), the Second Circuit appeared to have adopted a "slightly different" test. *Celotex Corp.*, 514 U.S. at 308 n.6. *In re Turner* stated that a proceeding was related to a bankruptcy if there was a "significant connection" between the two. *In re Turner*, 724 F.2d at 341 (citation omitted). Although the "significant connection" criterion seemed more rigorous than the *Pacor* test, the *In re Turner* test also allowed connections other than the monetary effect on the bankruptcy estate to inform the jurisdictional evaluation. *See Nemsa Est. v. Viral Testing Sys. Corp.*, No. 95 Civ. 0277, 1995 WL 489711, at *3 (S.D.N.Y. Aug. 15, 1995); *Weisman v. Southeast Hotel Prop.*, No. 91 Civ. 6232 (MBM), 1992 WL 131080, at *3 (S.D.N.Y. June 1, 1992).

> The test for determining whether litigation has a signifcant connection with a pending bankruptcy proceeding is whether its outcome might have *any* "*conceivable effect*" on the bankrupt estate. If that question is answered affirmatively, the litigation falls within the "related to" jurisdiction of the bankruptcy court.

Id. at 114 (emphasis supplied). Thus, in this Circuit, as elsewhere, whether an action has "any conceivable effect" on the bankruptcy estate determines whether a federal court has "related to" jurisdiction over the matter.

In determining whether potential claims by third party defendants against the debtor for either indemnification or contribution give rise to "related to" jurisdiction over litigation to which the debtor is not a party, courts in this circuit, particularly since *In re Cuyahoga*, have generally found jurisdiction where there is a "reasonable" legal basis for the claim. *See In re River Center Holdings, LLC*, 288 B.R. 59, 63-65 (Bankr. S.D.N.Y. 2003) (contractual duty of debtor to indemnify guarantor who was third party defendant); *In re Masterwear Corp.*, 241 B.R. 511, 516-17 (Bankr. S.D.N.Y. 1999) (corporate by-laws and Delaware law allowed third party defendants to recover legal fees and expenses from debtor); *In re Chateaugay Corp.*, 213 B.R. 633, 640 (S.D.N.Y. 1997) (no jurisdiction "in absence of any articulated legal basis for an indemnity action"); *Bond Street Assocs. v. Ames Dept. Stores, Inc.*, 174 B.R. 28 (S.D.N.Y. 1994) (finding jurisdiction even in the absence of an indemnification agreement where third party defendant would "normally have a claim" for indemnification against the debtor). *But see General Elec. Cap. Corp. v. Pro-Fac Coop.*, 2002 U.S. Dist. LEXIS 10419, No. 01 Civ. 10215 (LTS), 2002 WL 1300054, at *2 (S.D.N.Y. June 12, 2002) (recognizing that contribution and indemnification claims could conceivably affect estate administration but nonetheless finding that they were an "insufficient" basis for jurisdiction).

Several Circuit Courts of Appeals have also found jurisdiction over third party litigation based on an indemnification or contribution claim that has a conceivable effect on the debtor's estate. In *In re El Paso Refinery, LP*, 302 F.3d 343 (5th Cir. 2002), the Fifth Circuit weighed a "chain of indemnification provisions" that Texaco could have used to assert a claim against the debtor and determined that there was jurisdiction over a third party claim against Texaco even though Texaco did not actually assert any claim against the debtor. *Id.* at 348-49. In *Belcufine v. Aloe*, 112 F.3d 633 (3d Cir. 1997), the Third Circuit found jurisdiction over employee suits filed against corporate officers for non-payment of wages based on the indemnification provision in the corporate by-laws of the debtor. The court rejected the arguments that jurisdiction did not exist because the indemnification claims were contingent or a collusive attempt to manufacture jurisdiction. *Id.* at 636-37. The Sixth Circuit held in *In re Dow Corning Corp.*, 86 F.3d 482, that tens of thousands of claims filed against manufacturers and suppliers of silicone gel breast implants were related to the bankruptcy of the Dow Corning Corporation ("Dow") because of the claims for contribution and indemnification against Dow under theories of joint and several liability. In its view, "[t]he potential for Dow . . . being held liable in claims for contribution and indemnification . . . suffices to establish a conceivable impact on the estate in bankruptcy." *Id.* at 494. In so holding, the *Dow* court was influenced by the size of a threat "posed by the thousands of potential indemnification claims" and the threat that those claims posed to Dow's successful reorganization. *Id.* In *In re Wolverine Radio Co.*, 930 F.2d 1132 (6th Cir. 1991), a contractual indemnification provision supported jurisdiction even though the debtor "would not be affected until and unless [the third party] invoked the indemnification" provision. *Id.* at 1143. *Wolverine* observed

that where the parties are "intertwined," it would "not require a finding of definite liability of the estate as a condition precedent to hold an action related to a bankruptcy proceeding." *Id.* (citation omitted). *See also Arnold v. Garlock, Inc.*, 278 F.3d 426, 440 (5th Cir. 2001) (generally approving of "related to "jurisdiction for contribution claims in the mass tort context, but declining to enter stay of the remand of third-party actions where the removing defendant had not shown a likelihood of success on any contribution claim); *In re Canion*, 196 F.3d 579, 586-87 (5th Cir. 1999) (third party litigation that might decrease the claims against the estate is related to bankruptcy); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986) (actions are related to bankruptcy when brought against officers of debtor who may be entitled to indemnification under debtor's insurance policy).

Against the weight of those decisions is the recent Third Circuit decision in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002). The debtor and other manufacturers and distributers of friction products containing asbestos had been sued in tens of thousands of actions in state courts across the country. After the debtor filed for bankruptcy, and plaintiffs dismissed it from their actions, the co-defendants removed the litigation to federal court on the ground that their indemnification and contribution claims against the debtor made the litigation "related to" the bankruptcy. *Id.* at 372-73. Reading its own decision in *Pacor* more narrowly than other courts have done, it refused to grant a writ of mandamus to overturn a lower court's finding that "related to" jurisdiction did not exist. *Id.* at 384.

In Pacor itself, the Third Circuit had held that a lawsuit against a distributor of asbestos was not "related to" the bankruptcy of the asbestos manufacturer, since it was "at best . . . a mere precursor" to a claim for indemnification. *Pacor*,

743 F.2d at 995. The *Pacor* court noted that the manufacturer had no "automatic" liability for any judgment against the distributor since it had no indemnification agreement, and that there could be no effect on the bankruptcy estate until the distributor filed a claim. *Id.* at 995-96.

Focusing not on the broad standard for "related to" jurisdiction articulated by *Pacor* and cited with approval by the Supreme Court in *Celotex, see supra*, or the limited nature of *Pacor*'s holding, or even its own precedents in which it had found jurisdiction, *see, e.g.*, *Belcufine*, 112 F.3d at 636, the *Federal-Mogul* court opined that jurisdiction exists where "the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit." *Federal-Mogul*, 300 F.3d at 382. While the Intervenors in particular place great weight on *Federal-Mogul*, the *Pacor* standard and the more persuasive authority described above indicate that jurisdiction over a third party action exists where a claim for indemnification or contribution arising from that litigation has a conceivable effect on a bankruptcy proceeding.

The NYCERS Director Defendants allege that this action will affect the bankruptcy estate in at least four ways: (1) the ongoing, court-ordered payment of the NYCERS Director Defendants' legal fees; (2) the indemnification rights stated in Article X of WorldCom's by-laws; (3) the WorldCom insurance policies that provide Director and Officer ("D&O") coverage for the NYCERS Director Defendants; and (4) the statutory right to contribution under 15 U.S.C. § 77k(f)(1).[16]

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[16] 15 U.S.C. § 77k(f)(1) provides:

> Except as provided in paragraph (2), *all* or any one or more of the *persons* specified in subsection (a) of this section *shall be jointly and severally liable*, and *every person* who becomes liable to make any payment under this section *may recover contribution* as in cases of contract from any person who, if sued separately, would have

In addition, the NYCERS Director Defendants stress that all of the allegations against them stem from their association with the debtor.

NYCERS contests that there is a reasonable basis for the first three of the grounds on which the NYCERS Director Defendants rely. It contends (1) that the attorneys' fees are being paid to special counsel for the debtor and not on behalf of the NYCERS Director Defendants; (2) that the NYCERS Director Defendants have not met the conditions precedent to entitle them to indemnification under WorldCom's by-laws and that indemnification is barred, in any event, as a matter of law; and (3) that WorldCom does not share rights to the insurance that is providing the D&O coverage.[17] NYCERS has not contested, however, that there is a reasonable basis for the statutory contribution claim.

The NYCERS Underwriter Defendants also argue that their indemnification and contribution rights against WorldCom have a "conceivable effect" on the WorldCom estate and thus create "related to" jurisdiction. The NYCERS Underwriter Defendants rely on (1) the indemnification clauses in the underwriting agreements for WorldCom's May 2000 and May 2001 bond offerings; (2) the statutory provision regarding contribution in 15 U.S.C. § 77k(f)(1); and (3) common law theories for WorldCom's joint and several liability. The NYCERS Underwriter Defendants filed Proofs of Claim on August 2, 2002, and on January 17, 2003, in the WorldCom bankruptcy proceeding seeking reimbursement for defense

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> been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(emphasis supplied).

[17] Intervenors add that WorldCom has disclaimed all rights to the insurance providing the majority of the D&O coverage.

costs and asserting tort and contract claims against WorldCom in addition to the contractual and statutory indemnity and contribution claims.[18] Like the NYCERS Director Defendants, the NYCERS Underwriter Defendants argue that the identity of interests between the NYCERS Defendants and WorldCom creates a greater likelihood that this action will affect the bankruptcy estate.

NYCERS disputes that there is a reasonable basis for the first of these grounds—the contractual right to indemnification—but does not contest that the statutory and common law rights to contribution have a reasonable basis. The parties do not dispute, therefore, that the NYCERS Defendants have identified a reasonable basis for claims for contribution that have a conceivable effect on the WorldCom bankruptcy. The NYCERS Underwriter Defendants already have asserted these claims by filing a proof of claim in the WorldCom bankruptcy proceeding.

There is a reasonable basis for at least the contribution claims.[19] A finding that either the NYCERS Director or Underwriter Defendants are liable is entirely dependent on a finding that WorldCom engaged in wrongful conduct. Since the conduct of WorldCom and these Defendants was indisputably intertwined, the theories of liability pressed by

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[18] In their Proofs of Claim, the NYCERS Underwriter Defendants claim "broad indemnities and rights to contribution against the Debtors for damages and costs incurred as a result of [civil actions] commenced (or that may be commenced in the future) against them arising out of or related to" WorldCom securities offerings ranging in date from April 1, 1997 through May 15, 2001. In addition, the NYCERS Underwriter Defendants included claims for legal costs, including over five million dollars in legal costs accrued by January 17, 2003.

[19] In light of this conclusion, there is no need to address the competing arguments about whether there is a reasonable basis for the NYCERS Defendants' indemnification claims, or even decide the extent to which a defendant has a burden to show that there is a reasonable basis for a claim.

NYCERS are necessarily interconnected with these Defendants' rights to contribution. Because the effect of contribution claims on the bankruptcy estate is at the very least "conceivable," the NYCERS action is related to the bankruptcy and subject to the jurisdiction of this Court.

The existence of strong interconnections between the third party action and the bankruptcy has been cited frequently by courts in concluding that the third party litigation is related to the bankruptcy proceeding. *See, e.g., In re Dow Corning*, 86 F.3d at 492-94; *In re Wolverine Radio Co.*, 930 F.2d at 1143; *In re Ames Dept. Stores, Inc.*, 190 B.R. 157, 161 (S.D.N.Y. 1995). Here, but for WorldCom's bankruptcy, it would have been named as a defendant in the NYCERS action,[20] and despite its absence as a party, its conduct will remain at the heart of the NYCERS litigation. As NYCERS states in its Complaint, "because WorldCom filed for protection under the bankruptcy laws, it is not named as a party defendant in this action . . . ."

NYCERS asserts that there are two additional barriers to a finding of jurisdiction. First, it contends that any claim for contribution must be a liquidated claim, that is, already reduced to judgment, to be related to the bankruptcy. In a parallel argument, it points to the bar contained in Section 502(e)(1)(B) of the Bankruptcy Code, 11 U.S.C. § 502 (e)(1)(B), to contingent claims, and argues that the NYCERS Defendants' claims for contribution will be disallowed. Next, NYCERS asserts that, as a matter of law, to support "related to" jurisdiction, the claim must enlarge or diminish the size of the bankruptcy estate and cannot merely alter the distribution among creditors. [21]

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[20] WorldCom has been named as a defendant in several of the Milberg Weiss Actions.

[21] The remaining argument pursued by NYCERS, that certain of the NYCERS Defendants' claims are too insignificant to affect the bank-

The argument that any claim for contribution or indemnification must be reduced to judgment to provide a basis for jurisdiction can be swiftly rejected. The *Pacor* standard, including the language cited with apparent approval by the Supreme Court in *Celotex*, 514 U.S. at 308 n.6, does not require the level of certainty that NYCERS proposes. If the litigation against the NYCERS Director and Underwriter Defendants had already concluded and resulted in a judgment against them, then the effect of their contribution claims on the bankruptcy proceeding would not simply be "conceivable," it would be certain and quantifiable. It is not uncommon, as has been the case with WorldCom, that the debtor's filing for bankruptcy and the onslaught of third party litigation are essentially simultaneous. Not infrequently, the debtor files for bankruptcy after being sued, and the claims against it are thereafter severed and transferred to bankruptcy court or dismissed but the litigation continues against the remaining defendants. *See, e.g., In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 705 (2d Cir. 1995). In many of the decisions already discussed, the on-going litigation has supported a finding of jurisdiction without any requirement that a judgment against a third party defendant already exist. *See, e.g., In re Canion*, 196 F.3d at 586-87; *In re Celotex Corp.*, 124 F.3d 619, 627; *Belcufine*, 112 F.3d at 637; *In re Dow*, 86 F.3d at 494.

NYCERS relies principally on *dicta* in *Pacor*, 743 F.2d 984, to support its argument that, since the NYCERS Defendants have only contingent, unliquidated claims against WorldCom for contribution, there is no jurisdiction. As already discussed, Pacor's holding is fairly narrow. It found

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ruptcy, is asserted solely in connection with the claims for attorneys' fees and certain indemnification theories. Since the contribution claims support jurisdiction, it is unnecessary to decide what role, if any, the size of a claim's effect on the estate plays in a determination of the existence of subject matter jurisdiction.

that, "at best," the defendant in the third party litigation had a claim for indemnification against the debtor. It noted, among other things, that there was no contract providing a right to indemnification or any agreement to indemnify. *Id.* at 995. *Pacor* contrasted its facts with the situation in *In re Brentano's*, 27 *B.R.* 90 (Bankr. S.D.N.Y. 1983), in which there was a guarantee and a contractual indemnification clause. *Pacor* noted that, in those circumstances "it is clear" that the third party action "would affect the estate in bankruptcy." *Id.* Therefore, despite the *dicta* in *Pacor* on which NYCERS relies, *Pacor* should not be read as requiring a judgment to have been entered against a third party defendant before the third party action can ever be found to be "related to" the bankruptcy proceeding. It is more consistent with the holding and all of the language in *Pacor* to read it as requiring, in effect, that there be a reasonable basis for a claim against the estate in order to find that the third party litigation could conceivably affect the bankruptcy estate. *See In re Celotex Corp.*, 124 F.3d at 627 (discussing *Pacor*).

In a related argument, NYCERS contends that the bar in the bankruptcy statute to payment of contingent claims prevents a finding of jurisdiction since the NYCERS Defendants' claims for contribution (and indemnification) are "not yet ripe." Section 502(e)(1)(B) of the Bankruptcy Code states that:

> Not withstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that . . . such claim for reimbursement or contribution *is contingent as of the time of allowance or disallowance* of such claim for reimbursement or contribution . . . .

11 U.S.C. § 502(e)(1)(B) (emphasis supplied).

Section 502(e)(1)(B) prevents a distribution from the estate from being made on the basis of contingent claims. *See Aetna Cas. & Sur. Co. v. Ga. Tubing Corp.*, 93 F.3d 56, 57 (2d Cir. 1996); *In re Drexel*, 148 B.R. 982, 987 (Bankr. S.D.N.Y. 1992). Contingency in the context of a claim for contribution by a joint tortfeasor relates to both liability and payment. *In re Drexel*, 148 B.R. at 990. "A contingent claim becomes fixed and allowable to the extent that the co-debtor has paid the underlying claim." *Id.* Where a contingent claim is disallowed, it may be reconsidered when the contingency is "resolved." *Id.* at 991 (citation omitted); *see* 11 U.S.C. § 502(j).

The present contingency of a claim, therefore, says little about whether the creditor will be able to have the claim reconsidered and allowed when it is no longer contingent. Claims that are contingent today nonetheless have a "conceivable" effect on the bankruptcy. As the Third Circuit has noted, Section 502(e)(1)(B) does not prevent a finding of jurisdiction in the case of contingent claims. *Belcufine*, 112 F.3d at 636-37. Whether or not a claim ultimately will be disallowed "is one for none other than the bankruptcy court." *Id.* at 637; *see also In re Celotex Corp.*, 124 F.3d at 626 (finding jurisdiction over a contingent claim because it had a conceivable effect on the bankruptcy due in part to the requirement under 11 U.S.C. § 502(c) to estimate contingent claims).

NYCERS's argument regarding the nature of the effect on the bankruptcy estate also fails. The contribution claims have the potential to alter the distribution of assets among the estate's creditors. Under the *Pacor* standard, "related to" jurisdiction exists when there is any impact on the "handling and administration of the bankrupt estate." *Celotex*, 514 U.S. at 308 n.6. The potential alteration of the liabilities of the estate and change in the amount available for distribution to other creditors is sufficient to find that litigation among non-

debtors is "related to" the bankruptcy proceeding. *See, e.g., In re Celotex*, 124 F.3d at 626; *In re Cuyahoga*, 980 F.2d at 114; *American Int'l Specialty Lines Ins. Co. v. Towers Fin. Corp.*, 198 B.R. 55, 58 (S.D.N.Y. 1996).

Finally, NYCERS argues that the recent decision in *Retirement Sys. of Alabama v. J.P. Morgan Chase & Co.*, 285 B.R. 519 (M.D. Ala. 2002) ("*RSA II*"),[22] should be followed. In *RSA II*, the Honorable W. Harold Albritton rejected the argument that indemnification clauses in the underwriting agreements between WorldCom and its underwriters supported jurisdiction, even when there was a Proof of Claim based on the indemnification claim filed in the WorldCom bankruptcy. *Id.* at 523, 530. Chief Judge Albritton construed the indemnification clause and determined that before a claim filed by an underwriter could affect the WorldCom estate, the underwriter would have to establish that it had made no untrue statements or omissions to WorldCom. *Id.* at 529. Finding that that hurdle made the "potential effect" of third party litigation on the bankruptcy "speculative," *id.* at 529, the court determined that there was no jurisdiction and remanded the action based in part on that reason. *Id.* at 530-31.

RSA II did not have the benefit of the more fully developed record presented by the parties in connection with the instant motion. As described above, not only the NYCERS Underwriter Defendants but also the NYCERS Director Defendants have presented multiple grounds for jurisdiction, and those grounds extend beyond indemnification clause con-

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[22] On May 31, 2002, the Honorable W. Harold Albritton issued an opinion addressing similar issues in an action arising out of the collapse of Enron Corporation also brought by the Retirement System of Alabama. *Retirement Sys. of Alabama v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002) ("*RSA I*"). Thus, the later, WorldCom-related opinion is referred to as *RSA II*.

strued in *RSA II*.[23] Given the present record, the NYCERS Defendants have carried their burden to show the existence of subject matter jurisdiction over the NYCERS **action.**

II. Section 22(a) of the Securities Act of 1933

NYCERS and Intervenors argue that Section 22(a) of the 1933 Act, 15 U.S.C. § 77v(a), bars removal of their federal securities law claims to federal court. They contend that the express carve-out of Section 22(a) from the general federal question removal statute also trumps a federal court's bankruptcy jurisdiction and removal authority. In apparent reliance on this construction, each of the federal claims pleaded by NYCERS and the Intervenors arises solely from the 1933 Act. Indeed, the Intervenors have pleaded only 1933 Act claims, and have not even added state law claims to their complaints.[24] The argument based on Section 22(a) is without merit.

Construction of the relevant statutes "must begin with the words of the text." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003); *see Mallard v. United States Dist. Court*, 490 U.S. 296, 300-01, 104 L. Ed. 2d 318, 109 S. Ct. 1814 (1989). Whether the meaning of the statute is plain or ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *United States v. Dauray*, 215 F.3d 257, 260-61 (2d Cir. 2000). A particular

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[23] Given that subject matter jurisdiction is amply supported by the contribution claims, it is unnecessary to address the NYCERS Defendants' arguments that *RSA II* erred in its construction of the indemnification clauses.

[24] Most Milberg Weiss Actions plead a single claim for a violation of Section 11, although at least one Milberg Weiss Action also contains a claim for violation of Section 12(a)(2) of the 1933 Act.

section of a statute should "be understood in context with and by reference to the whole statutory scheme . . . ." *Auburn Housing Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002); *see also Saks*, 316 F.3d at 345. In addition, comparison to other similar statutory provisions, *Mallard*, 490 U.S. at 305-07, and the statute's legislative history may be used to resolve ambiguity. *Dauray*, 215 F.3d at 264; *Auburn Housing Auth.*, 277 F.3d at 143-44.

The clear and unambiguous language of the bankruptcy removal statute—Section 1452—permits removal of 1933 Act claims. The argument presented by NYCERS, and more emphatically by the Intervenors, however, implicates two separate statutory schemes: the securities laws—specifically, the 1933 Act, the 1934 Act, the PSLRA, and SLUSA—and the Bankruptcy Code, as well as Sections 1331 and 1441 of the Judicial Code, 28 U.S.C. §§ 1331 and 1441 ("Section 1331") and ("Section 1441"). As the discussion that follows demonstrates, under the securities laws, federal jurisdiction is increasingly favored. Under the bankruptcy laws, efficiency and reorganization goals favor coordinating actions related to a bankruptcy in federal court. In the end, however, the determination is straightforward: removability of a Section 11 claim depends upon whether Section 22(a)—the 1933 Act removal provision—is an exception to both Section 1441 removal (original jurisdiction removal) and Section 1452 removal (bankruptcy removal). It is an exception to Section 1441; it is not an exception to Section 1452 removal.

A. The 1933 and 1934 Acts

Sections 11 and 12 of the securities laws, under which Intervenors state their claims, were enacted as part of the 1933 Act, the first federal law devoted to regulating the securities industry. The 1933 Act was passed in the wave of legislation enacted in President Franklin D. Roosevelt's first one hundred days in office. Although the federal government

had not previously made any serious attempt to regulate the securities industry, Congress did not enter an empty field. By the time Congress passed the 1933 Act, every state except Nevada had enacted a so-called "blue sky law" to regulate the sale of securities.[25]

The key jurisdictional provision of the 1933 Act is found in Section 22(a) (as amended), which provides for concurrent state and federal jurisdiction over some 1933 Act claims:

> *The district courts of the United States* and United States courts of any Territory, *shall have jurisdiction* of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, *concurrent with State* and Territorial *courts, except as provided* in section 77p of this title *with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

15 U.S.C. § 77v(a) (emphasis supplied). The exception to concurrent jurisdiction in the case of "covered class actions" was added in 1998, as described below.

Section 22(a) also bars removal of certain 1933 Act claims from state to federal court:

> *Except as provided* in section 77p(c), *no case* arising under this subchapter and brought in any State court of competent jurisdiction *shall be removed* to any court of the United States.

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[25] Although how the state statutes came to be known as "blue sky" laws is not clear, accounts agree that the name arose from the type of problems the statutes addressed: either "speculative schemes which have no more basis than so many feet of blue sky," 69A Am. Jur. 2d *Sec. Reg.* State § 1 (1993), or "fast-talking eastern industrialists selling everything including the blue sky." 1 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 8.1, at 490-92 (3d ed. 1995).

15 U.S.C. § 77v(a) (emphasis supplied). Commentators note that in enacting the 1933 Act, Congress sought both to provide a uniform federal approach to securities regulation, and to leave in place the existing state blue sky laws. *See* Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 Cornell L. Rev. 1, 25-29 (1998); Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 280-84 (1998).

The 1934 Act, on the other hand, provided exclusive federal jurisdiction over 1934 Act claims. 15 U.S.C. § 78aa (1994); *De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482 (1989). Section 10(b), for example, a commonly invoked cause of action for fraud in connection with the purchase or sale of securities,[26] was enacted as part of the 1934 Act and is subject exclusively to federal jurisdiction. *See* 15 U.S.C. § 78j(b); *see also* 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). Like the 1933 Act, however, the 1934 Act was drafted to protect, rather than to preempt, the state blue sky laws. *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 182 (1979); *see also* Painter, 84 Cornell L. Rev. at 20-28 (discussing blue sky laws, 1933 and 1934 Acts).

B. PSLRA & SLUSA

In 1995, when it enacted the PSLRA, Congress did not amend the jurisdictional provisions of Section 22(a). It did, however, promulgate a number of procedural reforms for federal securities litigation. Those reforms included (1) a

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[26] To state a claim under Section 10(b), and the corresponding enforcement Rule 10b-5, "a plaintiff must plead that the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir. 2000).

heightened pleading standard for fraud allegations,[27] 15 U.S.C. § 78u-4(b); (2) an automatic stay of discovery while motions to dismiss are pending, 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)(B); and (3) the "safe-harbor" provisions for forward-looking information. §§ 15 U.S.C. 77z-2(c)(1)(A)(i) and 2(c)(1)(B)(1), 78u-5(c)(1)(A)(i) and 5(c)(1)(B)(2).[28]

The PSLRA was perceived to have encouraged plaintiffs to pursue securities litigation in state rather than federal court. *See* Perino, 50 Stan. L. Rev. at 298-315; Painter, 84 Cornell L. Rev. at 42-47. In 1998, Congress enacted SLUSA, partly in response to this apparent shift. *See* Pub. L. No. 105-353 § 2(2). SLUSA's Congressional findings explained that the PSLRA had not had its intended effect because class action plaintiffs were avoiding the PSLRA's heightened procedural requirements by bringing suit in state court under state statutory or common law. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001); Pub. L. No. 105-353 §§ 2(1)-(5).

SLUSA amended Section 16 of the 1933 Act, 15 U.S.C. § 77p ("Section 16"), in several substantial ways to concentrate securities litigation in federal court. It preempted many state law claims to the extent that they were asserted in a securities class action and it made the removal of certain class actions based on federal claims mandatory. *See Lander*, 251 F.3d at 108. The preemption provision applies to any "covered class action."[29] It provides

> *No covered class action based upon the statutory or common law of any State* or subdivision thereof *may be*

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[27] The PSLRA pleading standard was based upon the pleading standard applied by the Second Circuit. *See Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001); *Ganino*, 228 F.3d at 169-70.

[28] For a discussion of other significant reforms, *see* Painter, 84 Cornell L. Rev. at 32-35.

[29] A covered class action is defined at 15 U.S.C. § 77p(f)(2).

> *maintained in any State or Federal court* by any private party alleging—(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b) (emphasis supplied).[30] The mandatory removal provision states that "[a]ny covered class action brought in any State court involving a covered security . . . *shall* be removable to the Federal district court . . . ." 15 U.S.C. § 77p(c) (emphasis supplied).[31]

Finally, for our purposes, SLUSA also amended the 1933 Act's removal provision—Section 22(a)—to integrate it with the mandatory removal of covered class actions. As amended, Section 22(a) states that "[*e*]*xcept as provided in section 77p(c) of this title* [for covered class actions], no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphasis supplied). Thus, SLUSA narrowed the Section 22(a) removal bar so that is would only apply to actions not covered by the Section 16 mandatory class action removal provision. Together, Sections 16 and 22 provide that federal court is, with limited exceptions not relevant here, the sole forum in which class actions involving covered securities may be pursued. *See Lander*, 251 F.3d at 108.

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[30] 15 U.S.C. § 77p(f)(3) defines "covered security" as a security that satisfies the standards set forth in paragraphs (1) or (2) of 15 U.S.C. § 77r(b).

[31] Other provisions in Section 16 preserve the right to bring a covered class action based on state law claims in an issuer's state of incorporation, *see* 15 U.S.C. § 77p(d)(1)(A), and preserve certain rights for State pension plans, *see* 15 U.S.C. § 77p(d)(2).

C. Federal Jurisdiction and Removal Authority

The 1933 Act's concurrent jurisdiction and removal bar is best understood in the context of the larger federal scheme for jurisdiction over actions arising under federal law and for the removal of such actions to federal court. Since 1875, federal district courts have had original jurisdiction over all cases arising under federal law pursuant to the statute now numbered as Section 1331. *See* 28 U.S.C. § 1331; *see also Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 826 (1986).

Section 1441(a), in turn, provides that if federal jurisdiction exists, an action may be removed from state to federal court unless Congress has "expressly provided" otherwise:

> *Except as otherwise expressly provided by Act of Congress*, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States . . . .

28 U.S.C. § 1441(a) (emphasis supplied). Section 1441 also allows removal of claims that are joined with claims over which federal courts have jurisdiction:

> *Whenever a separate and independent claim* or cause of action within the jurisdiction conferred by section 1331 of this title *is joined* with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . .

28 U.S.C. § 1441(c) (emphasis supplied). Whether removal is appropriate thus depends on whether the case, or some portion thereof, originally could have been filed in federal court. *See City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 163 (1997). If the basis for removal is the presence of a federal law claim, the "well-pleaded complaint" rule

requires that the federal question appear on the face of the complaint, rather than in an anticipated defense. *Id.*; *see also Jefferson County v. Acker*, 527 U.S. 423, 430-31 (1999); *Franchise Tax Board v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-11 (1983).

Section 22(a) is an exception to the Section 1441(a) removal provision. In Section 22(a), Congress "expressly provided," as required by Section 1441(a), that "[e]xcept as provided in section 77p(c), *no case* arising under [the 1933 Act] and brought in any State court of competent jurisdiction *shall be removed*." 15 U.S.C. § 77v(a) (emphasis supplied). Thus, a complaint stating solely 1933 Act claims, so long as they are not class action claims otherwise covered by SLUSA's mandatory removal provision, may not be removed if the only ground for removal is the existence of a federal law claim. The basis for removal in this case, however, was not simply the existence of a federal law claim, but the existence of bankruptcy jurisdiction.

As already described, the bankruptcy removal provision—Section 1452—is a separate but parallel provision to Section 1441. It was enacted in 1984 and promotes federal court jurisdiction over specified bankruptcy-related claims. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 131-32 (1995) (Ginsberg, J., concurring) ("Congress, when it added § 1452 to the Judicial Code chapter on removal of cases from state courts—a chapter now comprising 28 U.S.C. §§ 1441-1452—meant to enlarge, not to rein in, federal trial court removal/remand authority for claims related to bankruptcy cases." *Id.* Instead of providing for removal of any action over which the federal courts have *original* jurisdiction, as Section 1441 does, Section 1452 provides for removal of any action subject to the *bankruptcy* jurisdiction of the federal courts, as that jurisdiction is defined in Section 1334.

Like Section 1441, Section 1452 contains exceptions. Unlike Section 1441, however, the Section 1452(a) exceptions are limited and express. Section 1452(a) removal does not apply to (1) proceedings "before the United States Tax Court" or (2) "a civil action by a governmental unit to enforce such governmental unit's police or regulatory power." 28 U.S.C. § 1452(a).

D. The Interaction of Section 22(a) and Section 1452(a)

Applying the edict that statutory construction begins with an examination of the text, it is plain from the face of Section 1452(a) that it does not include Section 22(a) in its limited list of exceptions.[32] Indeed, Section 1452(a) does not even mention the securities laws. Section 1452(a) was enacted decades after Section 22 became law, and could easily have included a third exception to incorporate 1933 Act claims. It did not do so. *Inclusio unius est exclusio alterius*: the absence of such an exclusion leads to the conclusion that Section 1452(a) removal may apply to the securities claims at issue here. *See United States v. Tappin*, 205 F.3d 536, 540 (2d Cir. 2000) (applying this rule of statutory construction).

Interpreting Section 1452 to allow removal for all actions over which there is bankruptcy jurisdiction, saving two delineated exceptions, is consistent with the purpose of the Bankruptcy Code. The Second Circuit has observed, "Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings" and that "both the Supreme Court and this court have . . . broadly construed the jurisdictional grant in the 1984 Bankruptcy Amendments." *In re S.G. Phillips Constructors,*

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[32] Intervenors argue that Section 22(a) should provide an exception for Section 1452 removal. Intervenors provide no support for this contention. Intervenors' treatment would render Section 1452 a mere exception to an exception from removal, a result without any basis in the statutory language and at odds with the purpose and history of the relevant statutes.

Inc., 45 F.3d 702, 705 (2d Cir. 1995); *see also In re Best Prods., Co.*, 68 F.3d 26, 31 (2d Cir. 1995). Broadly construing the federal courts' bankruptcy jurisdiction is essential to their ability to preserve assets and reorganize the estate, particularly where there is a "complex factual scenario, involving multiple claims, policies and insurers." *In re United States Lines, Inc.*, 197 F.3d 631, 641 (2d Cir. 1999) (discussing enforcement of arbitration clause). The efficiency and reorganization goals of the Bankruptcy Code require interpreting Section 1452 in favor of federal jurisdiction and removal except in the limited cases it expressly excepts.

The NYCERS Defendants correctly rely on *Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020 (2d Cir. 1984), as supporting their removal of these actions. *Gonsalves* considered the explicit statutory bar to the removal of Jones Act claims. The Jones Act removal bar, contained in 28 U.S.C. § 1445(a), like Section 22(a), provides plaintiff with a choice-of-forum privilege. *See* 28 U.S.C. § 1445(a). It prevents the removal to federal court of Jones Act claims filed in state court. *Gonsalves*, 733 F.2d at 1022.

In *Gonsalves*, the non-removable Jones Act claim was joined with a claim for unseaworthiness, under general maritime law, and also sought maintenance and cure. No explicit bar to removal applies to either of these latter two claims, and diversity jurisdiction existed over the maintenance and cure claim. The defendant removed pursuant to Sections 1441(a) and 1441(c), the former of which allows for the removal of an action over which federal courts have original jurisdiction, and the latter of which provides that "whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title [federal question jurisdiction] is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . . ." 28 U.S.C. § 1441(c). The Second Circuit found that the maintenance and cure and Jones Act claims

were not sufficiently "independent" to defeat the choice-of-forum preference found in Section 1445(a). *Gonsalves*, 733 F.2d at 1026. The Second Circuit nonetheless declined to hold that Section 1445(a) overrides Section 1441(c). *Id.* In other words, the Second Circuit found that the Jones Act removal bar provided an express exception to removal under Section 1441(a), but did not create an exception from the "additional removal jurisdiction" available under Section 1441(c) for cases that otherwise could not be removed. *Id.* at 1022 (citation omitted). Applied to Section 22(a), a similar analysis would mean that Section 22(a)'s bar to the removal of 1933 Act claims would not prevent an action from being removed to federal court if there was a separate, appropriate basis for the removal.

Indeed, the principal case on which *Gonsalves* relied for this analysis, and a case from which it quoted extensively, *U.S. Indus., Inc. v. Gregg*, 348 F. Supp. 1004 (D. Del. 1972), used this very analysis to conclude that while 1933 Act claims were non-removable pursuant to Section 22(a), when they were joined with a single, separate and independently removable claim, they could be removed pursuant to Section 1441(c). The Gregg court held that, although Section 22(a) was one of the express exceptions to Section 1441(a) removal, it did not trump Section 1441(c). *Id.* at 1015-16.

Like Section 1441(c), Section 1452(a) provides for the removal of otherwise non-removable claims. Specifically, Section 1452(a) allows for the removal of claims "related to" a bankruptcy even if those claims would not otherwise be subject to federal jurisdiction. Like Section 1441(c), Section 1452(a) is not "trumped" by Section 22(a). Although Section 22(a) for the 1933 Act, like Section 1445(a) for the Jones Act, expresses a preference for allowing the plaintiff to choose the forum, Section 1452(a) reflects a preference for coordinating bankruptcy-related actions in the federal courts. Here, the conditions for bankruptcy jurisdiction have been met, and the

action does not fall within the two limited exceptions to removal under Section 1452(a).[33]

III. Defendants' Consent to Removal

The Intervenors contend that a remand is necessary unless each defendant consents to the removal. This argument is not being pursued with respect to the NYCERS action.

Section 1452(a) states that "*a party* may remove" a claim to federal court if it is related to a bankruptcy. The language of Section 1452(a) does not on its face indicate that the consent of all defendants is required to remove the action. It does not even require that the removal be initiated by a defendant or receive the consent of any defendant since it refers to "a party." In contrast, the general removal provision, Section 1441(a), refers to removal by "defendant or defendants" and has been interpreted to require that all defendants join in the removal petition. *See Still v. DeBuono*, 927 F. Supp. 125, 129 (S.D.N.Y. 1996).

It seems clear that Section 1452(a) does not require the defendants' unanimous consent to removal. *See Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 661 (4th Cir. 1985). It is not necessary, however, to resolve this issue now. Intervenors contend that the Andersen Defendants did not consent to the removal of some unspecified actions. It is not clear, however, whether the Andersen Defendants had even been served in those actions at the time of removal. Even under Section 1441(a), consent is not required from a defendant who has not been served at the time of removal.

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[33] None of the cases on which Intervenors rely is sufficiently persuasive to indicate that the foregoing analysis should not govern here. *See McRae v. Lykes Bros. S.S. Co.*, No. Civ. A. 983240, 1998 WL 898467 (E.D.La. Dec. 22, 1998); *Ariail Drug Co. v. Lease Partners, Corp.*, No. Civ. A. 96-G-0708-S, 1996 WL 1060890 (N.D. Ala. May 23, 1996); *Kinder v. Wisconsin Barge Line*, 69 B.R. 11 (E.D. Mo. 1986).

See Varela v. Flintlock Construc., Inc., 148 F. Supp. 2d 297, 301 (S.D.N.Y. 2001) (DLC); *Ell v. S.E.T. Landscape Design, Inc.*, 34 F. Supp. 2d 188, 194 (S.D.N.Y. 1999).[34]

IV. Mandatory Abstention

The mandatory abstention requirement in Section 1334(c)(2) does not apply to the NYCERS action.[35] Section 1334(c)(2) states

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced and can be timely adjudicated in a State forum of appropriate jurisdiction.

28 U.S.C. 1334(c)(2). A party seeking mandatory abstention must prove each of the following: (1) the motion to abstain was timely; (2) the action is based on a state law claim; (3) the action is "related to" but not "arising in" a bankruptcy case or "arising under" the Bankruptcy Code; (4) Section 1334 provides the sole basis for federal jurisdiction; (5) an action is commenced in state court; (6) that action can be "timely adjudicated" in state court. *See In re Adelphia Communs. Corp.*, 285 B.R. 127, 141 (Bankr. S.D.N.Y. 2002); *Renaissance Cosmetics, Inc. v. Development Specialists Inc.*, 277 B.R. 5, 12 (S.D.N.Y. 2002).

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[34] Andersen Defendants filed an opposition to the motion to remand on January 17, 2003.

[35] NYCERS abandoned its argument under Section 1334(c)(2) in its reply brief. The Intervenors do not rely at any point on Section 1334(c)(2) abstention.

A party is not entitled to mandatory abstention if it fails to prove any *one* of the statutory requirements. *See, e.g., In re Adelphia Commun. Corp.*, 285 B.R. at 143-44. Here, NYCERS has failed to satisfy its burden to prove at least two of the statutory requirements: that its action could be timely adjudicated in state court, or that Section 1334 provides the sole basis for jurisdiction.[36]

First, NYCERS asserts that "the gargantuan size of the WorldCom bankruptcy virtually guarantees that this action will be more quickly adjudicated in the State court." This naked assertion is inadequate to carry the point. *See Renaissance Cosmetics*, 277 B.R. at 14. The size of the WorldCom bankruptcy, the close connections between the defendants in this action and the debtor, and the complexity of this litigation suggest the contrary: remanding to state court could slow the pace of litigation dramatically. If each of the actions removed from state court were remanded, it would lead to duplicative motion practice and repetitious discovery, as well

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[36] Construing the language of Section 1334(c)(2), some courts have determined that Section 1334(c)(2) mandatory abstention cannot be invoked unless there is an on-going case in state court separate from the removed action. *See In re Adelphia Commun. Corp.*, 285 B.R. 127, 140-43 (Bankr. S.D.N.Y. 2002). There is an alternative parsing of the statute, however, that would not require any second action to exist. Since Section 1452(a) permits the removal of any "claim or cause of action," 28 U.S.C. § 1452(a), it is possible to abstain from litigating the removed claim, and to allow the remainder of the state court "action" to proceed. The language of Section 1334(c)(2) would support such a reading. It reads in pertinent part,

> Upon timely motion of a party *in a proceeding based upon a State law claim or State law cause of action*, . . . the district court shall abstain from hearing such proceeding *if an action is commenced* and can be timely adjudicated in a state forum . . . .

28 U.S.C. § 1334(c)(2) (emphasis supplied). Since it is clear for entirely separate reasons that Section 1334(c)(2) is inapplicable, it is unnecessary to decide whether Section 1334(c)(2) requires that a separate action exist in state court where, as here, it is appropriate to remove the entire action.

as requiring common issues to be resolved separately by courts across the country. NYCERS has not shown that its case could be both fairly and timely adjudicated by a state court in such circumstances.

As significantly, the mandatory abstention provision is not available because the NYCERS action could have been commenced in federal court. It pleads two federal securities law claims under the 1933 Act. The 1933 Act gives concurrent jurisdiction over those claims to both federal and state courts. *See* 15 U.S.C. § 77v(a); *United States v. Markiewicz*, 978 F.2d 786, 802-03 (2d Cir. 1992) (concurrent jurisdiction does not preclude exercise of federal jurisdiction).

V. Discretionary Abstention

NYCERS argues that, even if there is subject matter jurisdiction over this action, the Court should exercise its discretion to abstain pursuant to Section 1334(c)(1). Section 1334(c)(1) provides that "nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding . . . related to a case under title 11." 28 U.S.C. § 1334(c)(1).

Section 1334(c)(1) is informed by and interpreted according to "principles developed under the judicial abstention doctrines." *In re Pan American Corp.*, 950 F.2d 839, 846 (2d Cir. 1991). Those principles provide that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), and may abstain only for a few "extraordinary and narrow exceptions." *Id.* at 813 (citation omitted); *see also Woodford v. Community Action Ctr.*, 239 F.3d 517, 522 (2d Cir. 2001). The various abstention doctrines "share a common matrix: a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *In re*

Pan Am., 950 F.2d at 846 (citation omitted). Those considerations include comity and federalism, judicial economy, and efficiency. *See Colorado River*, 424 U.S. at 814-19; *Woodford*, 239 F.3d at 522; *In re Pan Am.*, 950 F.2d at 846.

Courts in this district commonly consider twelve factors in addressing a motion based on Section 1334(c)(1):

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced instate court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden [on] the court's docket, (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

In re Masterwear Corp., 241 B.R. at 520. The balance of these factors weighs heavily against abstention. The most important considerations in this regard are the following.

NYCERS has not identified any unique or unsettled issues of state law that warrant abstention based on comity concerns.

(Intervenors emphasize that "there are *no state law claims of any kind*" asserted in any of the Milberg Weiss Actions.) [37]

Important federal interests counsel against abstention. The NYCERS action contains two federal law claims. In *Woodford*, 239 F.3d 517, the Second Circuit cautioned that "even where there are some state-law issues, the presence of federal-law issues must always be a major consideration weighing against surrender" of federal jurisdiction. *Id.* at 523 (citation omitted) (discussing *Colorado River* abstention). The Court added that "if there is any substantial doubt as to whether complete and prompt protection of the federal rights is available in the state proceeding, dismissal would be a serious abuse of discretion." *Id.* (citation omitted); *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983).

In addition, it is beyond cavil that judicial economy and efficiency are best served by exercising the jurisdiction that so clearly exists. The MDL panel has consolidated scores of cases before this Court to promote the expeditious and efficient resolution of the claims arising from the collapse of WorldCom. The litigation is proceeding apace. Motions to remand, to sever and to dismiss have been fully briefed, and preliminary but important discovery issues addressed. With the consolidation of the litigation in one court, the motion practice and discovery process can be managed to protect the rights of all parties and to preserve, to the extent possible, the

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[37] The analysis in *RSA I* and *RSA II*, two decisions in which a federal court exercised its discretion to abstain and on which NYCERS and Intervenors place great reliance, does not persuade this Court that it should in the circumstances presented here take the extraordinary step of declining to exercise jurisdiction. Among other things, unlike the case in *RSA II*, subject matter jurisdiction is clearly established here.

maximum amount of assets for recovery by plaintiffs with meritorious claims.[38]

The Intervenors represent that the litigation of the claims addressed to the three bond offerings of April 1998, August 1998 and December 2000, will be "well beyond the scope of the other pending actions that have been sent to this Court." The Intervenors are wrong. All of the claims in these lawsuits stem from a course of conduct at WorldCom which is alleged to have resulted in multiple misrepresentations about WorldCom's financial condition in public statements and filings over several years. There is no suggestion by the Intervenors that the false statements that they allege were made in connection with these three bond offerings arose from any separate course of conduct. To the contrary, as even a brief examination of the complaints filed in the Milberg Weiss Actions illustrates, they are asserting that the wrongdoing that led to the actionable conduct underlying their claims for recovery based on the May 2000 and May 2001 bond offerings is also responsible for the claims they bring for the other bond offerings.

In contrast, if this Court were to abstain pursuant to Section 1334(c)(1) and remand the litigation originally filed in state court, motion practice and discovery would proceed sepa-

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[38] The Intervenors contend that there will be no efficiencies from consolidation since the Milberg Weiss Actions concern bond offerings not encompassed by the *Securities Litigation*, specifically, those in April 1998, August 1998 and December 2000. These three bond offerings are not the basis for the claims made in the Complaint. The Complaint seeks damages from the WorldCom bond offerings of May 2000 and May 2001. These two bond offerings, however, are also at the heart of both the NYCERS action and the Milberg Weiss Actions. The May 2000 and May 2001 bond offerings are the only two bond offerings at issue in the NYCERS action, and one or both of these two offerings are at issue in eleven out of the twelve Milberg Weiss Actions whose complaints have been submitted with this motion.

rately in many jurisdictions.[39] The litigation that would ensue in the various fora would be entirely duplicative and wasteful. It would eat into the funds available to pay the alleged victims identified in this litigation. As deep as some of the pockets in this action may be, they are in all likelihood not limitless. A remand would encourage a race for assets, a race that may deprive many victims of the alleged fraud of their fair share of any recovery.

Finally, it is important to weigh the impact of any remand on the ability of WorldCom to reorganize. While WorldCom's Trustee has not taken a position on this motion, the efficient and expeditious resolution of this litigation, and of its concomitant claims for contribution and indemnification, will assist the reorganization effort. Considering all of these factors, the Court declines to abstain pursuant to Section 1334(c)(1) and will exercise its jurisdiction.

VI. Equitable Remand

NYCERS also urges a remand under the equitable remand provisions of Title 28, United States Code, Section 1452(b). Section 1452(b) provides that "the court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." 28 U.S.C. § 1452(b). The equitable remand analysis, as the parties agree, is essentially the same as the Section 1334(c)(1) abstention analysis. *See Nemsa*, 1995 WL 489711, at *9. For the reasons already stated, this Court declines to remand the NYCERS action.

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[39] The Defendants point out that, if these actions are remanded, they will seek a stay. The analysis in this Opinion is not dependant on the likelihood of that application being made or granted.

CONCLUSION

The motion made by NYCERS to remand or abstain is denied.

SO ORDERED:

Dated: New York, New York

March 3, 2003

Denise Cote
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MASTER FILE 02 Civ. 3288 (DLC), 03 Civ. 338 (DLC), 03 Civ. 998 (DLC), 03 Civ. 167 (DLC) *

IN RE WORLDCOM, INC. SECURITIES LITIGATION; This Document Relates to ALL ACTIONS; PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, *et al.*,
Plaintiffs,

vs.

BERNARD J. EBBERS, *et al.*,
Defendants.

RAILWAYS PENSION TRUSTEE COMPANY, LTD.,
Plaintiff,

vs.

SALOMON SMITH BARNEY, INC., *et al.*,
Defendants.

INTERESTED PENSION FUNDS

May 5, 2003, Decided
May 6, 2003, Filed

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* *California Public Employees' Retirement System v. WorldCom, Inc. et al.*, No. 03 Civ. 167 (DLC), was the first of the actions brought by Milberg Weiss Bershad Hynes & Lerach, LLP on behalf of Interested Pension Funds to be assigned a docket number in the Southern District of New York. The complete list of Interested Pension Funds to which this Memorandum Opinion and Order applies is *infra* at 7 n.3.

MEMORANDUM OPINION AND ORDER

DENISE COTE, *District Judge*:

This Opinion addresses a renewed motion filed by Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss") on behalf of forty-one pension funds, and motions by certain Ohio pension funds and the Railways Pension Trustee Company to remand to state court their lawsuits arising out of the collapse of WorldCom, Inc. ("WorldCom"). As explained below, the arguments made by Milberg Weiss on behalf of its clients were already fully addressed and rejected in this Court's Opinion of March 3, 2003 ("March 3 Opinion"). *See In re WorldCom, Inc. Sec. Litig.*, Nos. 02 Civ. 3288 (DLC), 02 Civ. 8981 (DLC), 2003 WL 716243 (S.D.N.Y. March 3, 2003). Neither the Ohio funds nor Railways Pension Trustee have raised arguments that persuade the Court that the reasoning in the March 3 Opinion should not apply to their actions as well. For the reasons that follow, each of these motions to remand are denied.

In the long wake of WorldCom's collapse, numerous lawsuits have been filed around the country. Class action lawsuits filed in this district and sent to this district by the Judicial Panel on Multi-District Litigation ("MDL") were consolidated and lead plaintiff's counsel appointed in August 2002. During this same period, lawsuits were filed asserting individual rather than class claims, principally on behalf of pension funds ("Individual Actions"). Many of the Individual Actions pleaded violations of the Securities Act of 1933 ("1933 Act") and were brought in state courts. As the Individual Actions were removed to federal court on the theory that they were related to the bankruptcy of WorldCom, the MDL panel transferred to this Court those actions pending outside of the Southern District of New York.

Certain plaintiffs in the Individual Actions that had been removed from state to federal court contested the existence of

federal subject matter jurisdiction. The New York City Employees' Retirement System ("NYCERS") moved to remand its action to state court. NYCERS and eight co-plaintiffs had filed suit alleging violations of the 1933 Act and common law fraud arising out of their purchase of WorldCom stocks and bonds from 1999 through June 2002. The complaint included a claim for violation of Section 11 of the 1933 Act, 15 U.S.C. § 77k ("Section 11"). Milberg Weiss also contested removal and federal jurisdiction on behalf of forty-one plaintiffs in the numerous Individual Actions it had filed across the country ("Interested Pension Funds"). The Interested Pension Funds were permitted to intervene in NYCERS's motion so that their arguments concerning removal could be heard on an expedited basis. With the understanding that its clients would be permitted to intervene, Milberg Weiss had agreed to withdraw the objection to the MDL's November 2 Conditional Transfer Order. *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 716243 at *3 n.11. The March 3 Opinion addressed and rejcted the arguments made by both NYCERS and Milberg Weiss.

An Order of March 3 ("Order") permitted any plaintiff, other than the plaintiffs in the NYCERS action, to show cause by March 21 why the March 3 Opinion did not require the denial of any timely motion to remand that they had filed. The Order gave notice that failure to make such a submission would be deemed a withdrawal of any motion to remand. The briefing in response to the Order was ordered to be completed on April 11. This Memorandum Opinion addresses the three submissions received in response to the Order.

1. Interested Pension Funds

On March 20, Milberg Weiss filed a response to the Order on behalf of the forty-one Interested Pension Funds. These are the same clients it had identified in its December 6 submission in support of intervention on NYCERS's remand

motion.[1] Each of its arguments had already been fully considered and addressed in the March 3 Opinion; its March 20 response merely reargues issues it had previously presented. Accordingly on April 2, this Court issued an Order stating that "should the Court require a response to the Interested Pension Funds' submission dated March 20, 2003, it will notify the parties." Nothing in Milberg Weiss's March 20 response to the Order requires reconsideration of any of the analysis contained in the March 3 Opinion or further discussion.[2] Its renewed motion for remand is denied as to all forty-one Interested Pension Funds.[3]

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[1] The State of Wisconsin Investment Board and the City of Milwaukee Employees Retirement System are among the forty-one pension funds on whose behalf Milberg Weiss filed its motion to intervene, and on whose behalf it submitted its March 20 response. *See In re WorldCom, Inc. Sec. Litig.*, 2003 WL 716243, at *3 n.11 & n.12; *infra* at n.3. Although an April 25 letter to the Hon. Charles N. Clervert, Jr. for the United States District Court of the Western District of Wisconsin indicates that the March 20 submission was not on behalf of these Wisconsin entities, that is flatly contradicted by the Milberg Weiss December 6 and March 20 submissions.

[2] On April 25, Milberg Weiss presented an untimely supplement to its response to the Order. The basis for the submission was the WorldCom Plan of Reorganization and its purported effect on this Court's jurisdiction. Defendants have asked for an opportunity to respond within one week of receiving permission to do so. A separate scheduling order issued today grants such permission.

[3] California Public Employees Retirement System, California State Teachers Retirement System, Los Angeles County Employees Retirement System, State Universities Retirement System of Illinois, Board of Trustees of the Teachers Retirement System of the State of Illinois, Illinois State Board of Investment, West Virginia Investment Management Board, Washington State Investment Board, Alameda County Employees' Retirement Association, Alameda-Contra Costa Transit Employees' Retirement Plan, City of South San Francisco, Contra Costa County Employees' Retirement Board, Imperial County Board of Retirement, Mendocino County Employees' Retirement Association, Oakland Fire and Police Retirement System, Sacramento County Employees' Retirement System,

2. Ohio Funds

On March 20, certain Ohio funds[4] responded to the Order in light of what they believed would be the imminent transfer of their case to this Court. Since their action does not include any cause of action based on federal law, they argue that it can be distinguished from the circumstances addressed in the March 3 Opinion.

First, they argue that the Eleventh Amendment to the United States Constitution bars the removal of their lawsuit to federal court since there is no federal law claim in the lawsuit. As described in the March 3 Opinion, however, the basis for

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Sacramento Regional Transit District Contract Employees' Retirement Plan, Sacramento Regional Transit District Salaried Employees' Retirement Plan, San Bernardino County Employees' Retirement Association, San Diego County Employees' Retirement Association, San Diego City Employees' Retirement System, San Francisco City and County Employees' Retirement System, Sonoma County Employees' Retirement Association, Tulare County Employees' Retirement Association, Ventura County Employees' Retirement Association, Screen Actors Guild-Producers Pension and Health Plans, Directors Guild of America-Producers Pension and Health Plans, Motion Picture Industry Pension Health Plans, Motion Picture Industry Individual Account Plan, Producers-Writers' Guild of America Pension Plan, Writers' Guild-Industry Health Fund, IATSE Local # 33 Pension Trust, Air Conditioning & Refrigeration Industry Retirement Trust Funds, Sheetmetal and Workers Pension Plan of Southern California, Arizona and Nevada, Montana Board of Investments, State of Wisconsin Investment Board, City of Milwaukee Employees Retirement System, United Food and Commercial Workers Union Local 880-Retail Food Employers Joint Pension Fund, United Food and Commercial Workers Union Local 880-Mercantile Employers Joint Pension Fund, United Food and Commercial Workers Union-Employer Pension Fund, and United Food and Commercial Workers Union-Employer Health and Welfare Fund.

[4] The Public Employees Retirement System of Ohio, State Teachers Retirement System of Ohio, School Employees Retirement System of Ohio, Ohio Bureau of Workers Compensation, Ohio Police & Fire Pension Fund, and Ohio State Highway Patrol System.

federal subject matter jurisdiction over the Individual Actions was not the existence of a federal law claim under the 1933 Act, but the existence of bankruptcy jurisdiction. *See In re WorldCom, Inc. Sec. Litig.*, 2003 WL 716243, at * 5. Consequently, the absence of a federal law claim from the causes of action on which the Ohio funds have brought suit does not affect the analysis in the March 3 Opinion that there is federal subject matter jurisdiction over an action such as theirs and that removal to federal court was proper. Moreover, the doctrine of sovereign immunity is inapplicable to a state when it acts as a plaintiff. *See, e.g., Lapides v. Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564-65; *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 297 (S.D.N.Y. 2001).

The Ohio funds also invoke the doctrine of mandatory abstention. The March 3 Opinion rejected the mandatory abstention argument presented there because of the absence of at least two of the six grounds necessary to entitlement to mandatory abstention. Specifically, the March 3 Opinion found that the NYCERS action could have been commenced in federal court and that the naked assertion that state court litigation of the NYCERS action would be timely was inadequate and unpersuasive. *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 716243, at *18-19. The Ohio funds argue that the Ohio courts can litigate their action expeditiously and that the action could not have been commenced in federal court since there is neither federal question nor diversity jurisdiction. The Ohio funds have not demonstrated that their action can be timely adjudicated in state court. Remanding the Ohio funds' case to state court will, in fact, slow the pace of the case dramatically since WorldCom has given notice of its intention to file a motion for a preliminary injunction in the Bankruptcy Court to enjoin the Ohio funds action if it is remanded and certain defendants before this Court have indicated an

intention to seek a similar injunction in aid of this Court's jurisdiction and control over this complex litigation. In such circumstances, the rudimentary showing made by the Ohio funds is insufficient to carry the day.

3. Railways Pension Trustee

Finally, the Railways Pension Trustee has filed a motion to remand in response to the Order. Railways Pension Trustee concedes that the March 3 Opinion controls in its action, but nonetheless filed its motion to remand in order to preserve its right to voice its disagreement with the Opinion on appeal.

Conclusion

The renewed motion for remand by the forty-one Interested Pension Funds represented by Milberg Weiss, and the motions for remand by the Ohio funds and the Railways Pension Trustee Company are denied. All other motions for remand are deemed withdrawn pursuant to the terms of the March 3, 2003 Order.

SO ORDERED:

Dated: New York, New York

May 5, 2003

DENISE COTE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed May 20, 2003]

MASTER FILE 02 Civ. 3288 (DLC)

IN RE WORLDCOM, INC. SECURITIES LITIGATION;
This Document Relates to ALL ACTIONS

OPINION & ORDER

DENISE COTE, *District Judge*:

This Opinion addresses a third attempt by Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss"), to return to state court individual lawsuits filed by forty-one pension funds ("Milberg Weiss Actions") arising from their investments in WorldCom, Inc. ("WorldCom"). For the reasons discussed below, the motion for remand is again denied.

The collapse of WorldCom gave rise to numerous lawsuits against the company and those associated with it. Class action lawsuits asserting claims arising under the federal securities laws were filed in this district and were sent to this district by the Judicial Panel on Multi-District Litigation ("MDL"). In August 2002, the class actions were consolidated and lead plaintiff's counsel was appointed. During the same period, lawsuits asserting individual rather than class claims were filed across the country ("Individual Actions"). Many of the Individual Actions pleaded claims arising under the Securities Act of 1933 and were brought in state courts. As defendants removed the Individual Actions to federal court on the theory that they were related to WorldCom's bankruptcy, the MDL panel transferred those actions pending outside the Southern

District of New York to this Court. The removal and transfer of the Individual Actions is on-going and, in some cases, contested.

Upon removal, certain plaintiffs in the Individual Actions contended that federal subject matter jurisdiction did not exist over their actions. The New York City Employees' Retirement System ("NYCERS") moved to remand its action to state court. NYCERS's complaint alleged violations of the 1933 Act and common law fraud arising out of the purchase of WorldCom securities from 1999 through June 2002. Milberg Weiss sought and received permission to intervene in NYCERS's remand motion on behalf of forty-one pension fund plaintiffs it represented[1] so that their arguments could be

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[1] California Public Employees Retirement System, California State Teachers Retirement System, Los Angeles County Employees Retirement System, State Universities Retirement System of Illinois, Board of Trustees of the Teachers Retirement System of the State of Illinois, Illinois State Board of Investment, West Virginia Investment Management Board, Washington State Investment Board, Alameda County Employees' Retirement Association, Alameda-Contra Costa Transit Employees' Retirement Plan, City of South San Francisco, Contra Costa County Employees' Retirement Board, Imperial County Board of Retirement, Mendocino County Employees' Retirement Association, Oakland Fire and Police Retirement System, Sacramento County Employees' Retirement System, Sacramento Regional Transit District Contract Employees' Retirement Plan, Sacramento Regional Transit District Salaried Employees' Retirement Plan, San Bernardino County Employees' Retirement Association, San Diego County Employees' Retirement Association, San Diego City Employees' Retirement System, San Francisco City and County Employees' Retirement System, Sonoma County Employees' Retirement Association, Tulare County Employees' Retirement Association, Ventura County Employees' Retirement Association, Screen Actors Guild-Producers Pension and Health Plans, Directors Guild of America-Producers Pension and Health Plans, Motion Picture Industry Pension Health Plans, Motion Picture Industry Individual Account Plan, Producers-Writers' Guild of America Pension Plan, Writers' Guild-Industry Health Fund, IATSE Local # 33 Pension Trust, Air Conditioning & Refrigeration Industry Retirement Trust Funds, Sheetmetal and

heard on an expedited basis. Milberg Weiss argued that federal subject matter jurisdiction was lacking and that its forty-one actions should be remanded to the state courts in which they were filed. With the understanding that its clients would be permitted to intervene, Milberg Weiss had agreed to withdraw its objection to the MDL panel's November 2 Conditional Transfer Order. *In re WorldCom Sec. Litig.*, 2003 WL 716243, at *3 n.11.

On March 3, this Court issued an Opinion denying NYCERS's motion to remand and fully addressing and rejecting the arguments made on behalf of the Milberg Weiss Actions. *See In re WorldCom, Inc. Sec. Litig.*, Nos. 02 Civ. 3288, 02 Civ. 8981 (DLC), 2003 WL 716243 (S.D.N.Y. March 3, 2002) ("March 3 Opinion"). The March 3 Opinion held that the action was properly removed under Section 1452 of Title 28 of the United States Code ("Section 1452") because there was federal jurisdiction over the action as "related to" WorldCom's bankruptcy estate pursuant to Section 1334 of Title 28 of the United States Code ("Section 1334").

By Order dated March 3 ("March 3 Order"), any plaintiff, other than the plaintiffs in the NYCERS action, was permitted to show cause by March 21 why the March 3 Opinion did not require the denial of any motion to remand that they had timely filed. The briefing in response to the March 3 Order was ordered to be completed by April 11. On March 20, Milberg Weiss filed a response to the March 3 Order on behalf of the forty-one Milberg Weiss Actions identified in its

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Workers Pension Plan of Southern California, Arizona and Nevada, Montana Board of Investments, State of Wisconsin Investment Board, City of Milwaukee Employees Retirement System, United Food and Commercial Workers Union Local 880-Retail Food Employers Joint Pension Fund, United Food and Commercial Workers Union Local 880-Mercantile Employers Joint Pension Fund, United Food and Commercial Workers Union-Employer Pension Fund, and United Food and Commercial Workers Union-Employer Health and Welfare Fund.

December 6 submission requesting permission to intervene in NYCERS's remand motion. Since each of the arguments raised in Milberg Weiss's March 20 submission merely reargued issues fully presented in its briefs filed in connection with NYCERS's motion, on April 2 this Court issued an Order stating that it would notify the parties if a response were necessary. On May 5, 2003, this Court issued an Opinion and Order finding that nothing in Milberg Weiss's March 20 submission required reconsideration of the March 3 Opinion, and denying the motion to remand by the Milberg Weiss Actions.

On April 25, Milberg Weiss submitted an untimely supplement to its March 20 submission. Milberg Weiss argues that remand is now appropriate in light of the filing on April 14, 2003, of WorldCom's Plan of Reorganization ("Plan") and Disclosure Statement with the United States Bankruptcy Court. It contends that this Court's federal subject matter jurisdiction will be extinguished in August 2003, when it predicts that WorldCom's Plan will be confirmed. It argues that the confirmation of the Plan will divest this Court of "related to" jurisdiction because the Plan is likely to limit the defendants' ability to recover from the estate on their indemnification and contribution claims. In the alternative, Milberg Weiss argues again that this Court should abstain from exercising jurisdiction over its actions.

Discussion

As the Supreme Court and the Second Circuit have recognized, "the existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Federal Deposit Ins. Co. v. Four Star Holding Co.*, 178 F.3d 97, 100 (2d Cir. 1999) (citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)); *see also LeBlanc v. Cleveland*, 248 F.3d 95, 100 (2d Cir. 2001). "If jurisdiction exists at the time an action is commenced, such

jurisdiction may not be divested by subsequent events." *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991).

Although the Second Circuit standard for "related to" jurisdiction requires a court to determine whether an action will have "any conceivable effect" on the bankruptcy estate, *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992), it does not require federal district courts constantly to revisit jurisdictional findings to determine whether the effect of the litigation on the bankruptcy estate remains "conceivable." Instead, federal jurisdiction arising under Section 1334 is determined, like federal jurisdiction generally, on the basis the facts at the time of removal. *See In re Bissonnet Invs. LLC*, 320 F.3d 520, 525 (5th Cir. 2003); *In re Celotex Corp.*, 124 F.3d 619, 626 (4th Cir. 1997); *In re Toledo*, 170 F.3d 1340, 1346 n.8 (11th Cir. 1999).

Although the Second Circuit has not squarely addressed this issue in the context of Section 1334 jurisdiction, its reasoning in *Four Star Holding* is instructive. *See Four Star Holding*, 178 F.3d at 100-01. In that case, the sole basis for federal jurisdiction alleged in the complaint was 12 U.S.C. § 1819(b), which provides that "all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States." *Id.* at 100. The FDIC invoked federal jurisdiction because it held the assets in question at the time the complaint was filed, but while the litigation was pending, the FDIC transferred its interest in the property to a third party. *Id.* Defendants then argued that because the transfer of assets removed the FDIC from the action, federal jurisdiction no longer existed. The Second Circuit rejected this argument and held "that the transfer of assets by FDIC to a private third party does not divest the court of subject matter jurisdiction." *Id.* The court explained that "[a]dopting a rule which would make federal jurisdiction contingent on who owned an

interest in certain property at a particular time could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation." *Id.* at 100-01.

Similarly, adopting a rule that would divest federal courts of subject matter jurisdiction over actions "related to" a bankruptcy estate as the confirmation of the reorganization plan grew near would create perverse incentives for the parties to engage in delay and gamesmanship in both the bankruptcy reorganization and the related litigation. Even if the Plan is confirmed and the bankruptcy case dismissed, this Court will retain jurisdiction. *Cf. In re Porges*, 44 F.3d 159, 162 (2d Cir. 1995) ("the dismissal of an underlying bankruptcy case does not automatically strip a federal court of jurisdiction over an adversary proceeding which was related to the bankruptcy case at the time of its commencement").

Since federal subject matter jurisdiction existed at the time of removal, when that determination is appropriately made, it is not necessary to address the arguments regarding the likelihood of successful confirmation of the Plan. Nor is it necessary to address Milberg Weiss's arguments on abstention. The March 3 Opinion fully addressed the abstention arguments, and the April 25 submission presents no persuasive reason to revisit that analysis now.

Conclusion

The renewed motion by the Milberg Weiss Actions to remand or abstain is denied.

SO ORDERED:

Dated: New York, New York

May 20, 2003

DENISE COTE
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[June 15, 2004]

Docket No. 04-0219-cv

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Plaintiff-Appellant,

v.

WORLDCOM, INC., BERNARD J. EBBERS, JAMES C. ALLEN, MAX E. BOBBITT, ARTHUR ANDERSEN, LLP, CITIGROUP GLOBAL MARKETS, CLIFFORD ALEXANDER JR., JUDITH AREEN, CARL J. AYCOCK, FRANCESCO GALESI, STILES A. KELLETT JR., GORDON S. MACKLIN, JOHN A. PORTER, BERT C. ROBERTS, JR., JOHN W. SIDGMORE, LAWRENCE C. TUCKER, JUAN VILLALONGA, ABN AMRO INCORPORATED, BANK OF AMERICA SECURITIES, LLC, BANK OF AMERICA CORPORATION, CREDIT SUISSE FIRST BOSTON, LLC, DEUTSCHE BANK AG, DEUTSCHE BANK ALEX. BROWN, INC., GOLDMAN SACHS & CO., GOLDMAN SACHS GROUP,. INC., J.P. MORGAN & CO., J.P. MORGAN SECURITIES INC., LEHMAN BROTHERS HOLDINGS INC., LEHMAN BROTHERS INC., NATIONSBANC MONTGOMERY SECURITIES, LLC AND UBS WARBURG, LLC,

Defendants-Appellees.

PRESENT: Honorable JAMES L. OAKES, Honorable JOSÉ A. CABRANES, *Circuit Judges.*[*]

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 15th day of June, two thousand and four,

The petition for rehearing by the original panel is DENIED. The motion to issue the mandate forthwith is GRANTED IN PART AND DENIED IN PART. The mandate will issue in the normal course. However, we hereby vacate our order of February 3, 2004, which directed the District Court to extend the deadline to opt out of the class action, as well as the accompanying deadline by which plaintiffs who have filed individual actions must move to dismiss their actions voluntarily, until at least thirty days after this Court's mandate issues.

FOR THE COURT,

By: /s/ Roseann B. MacKechnie
ROSEANN B. MACKECHNIE
CLERK OF THE COURT

[*] The Honorable Robert D. Sack of the United States Court of Appeals for the Second Circuit, originally a member of this panel, has recused himself from consideration of this appeal. Pursuant to Second Circuit Local Rule 0.14(b), this order is being entered by the two remaining members of the panel.